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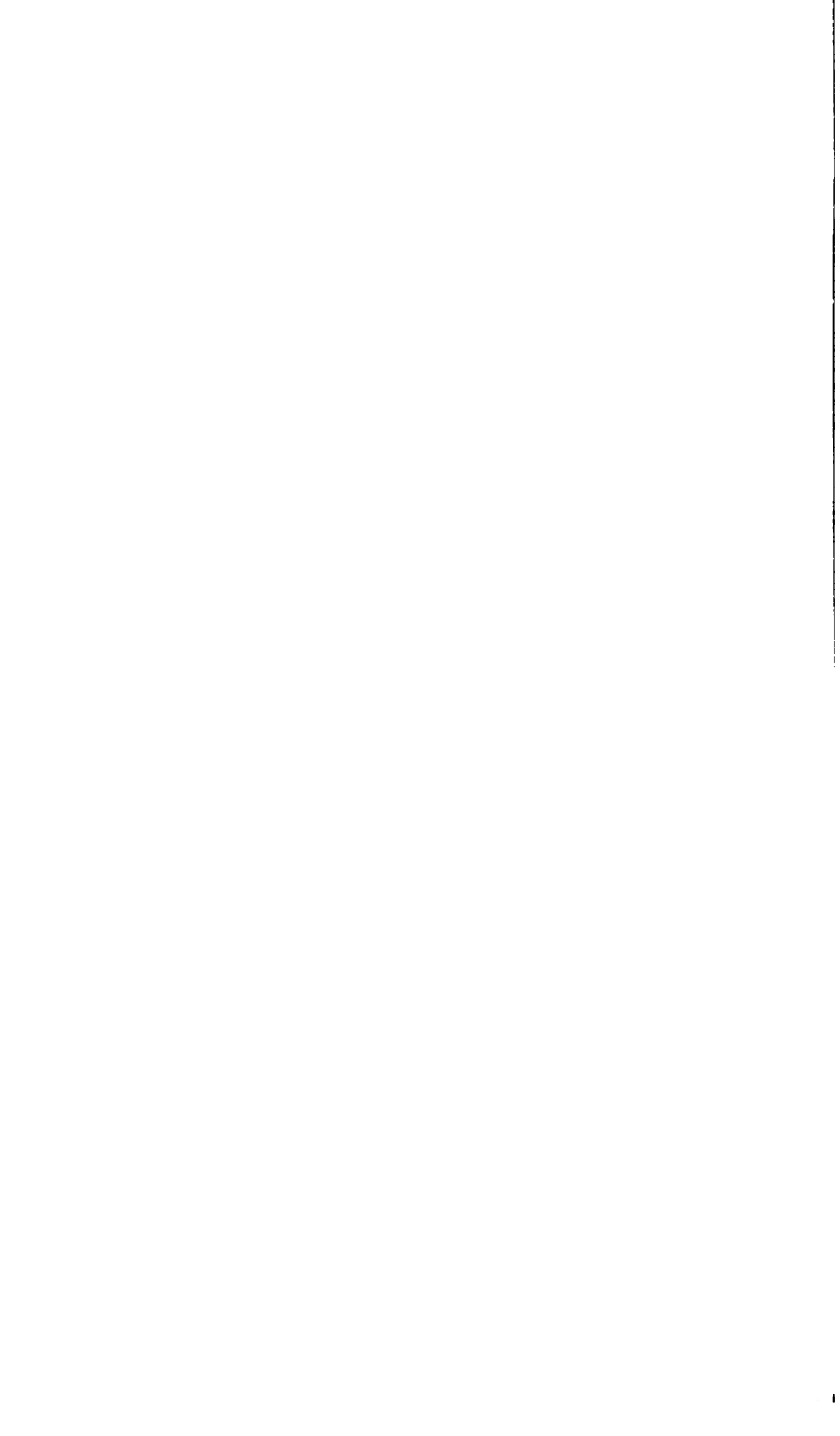
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127 63

REPORTS OF CASES

DECIDED IN THE

COURT OF APPEALS

OF THE

STATE OF NEW YORK,

(SECOND DIVISION)

FROM AND INCLUDING DECISIONS OF DECEMBER 10, 1889, TO
DECISIONS OF MARCH 18, 1890,

WITH

NOTES, REFERENCES AND INDEX.

BY H. E. SICKELS, 73
STATE REPORTER.

VOLUME CXVIII.

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JUDGES OF THE COURT OF APPEALS.

(SECOND DIVISION.)

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GEORGE B. BRADLEY,

JOSEPH POTTER,

IRVING G. VANN,

ALBERT HAIGHT,

ALTON B. PARKER,

CHARLES F. BROWN,

ASSOCIATE JUDGES.



TABLE OF CASES

REPORTED IN THIS VOLUME

A.		PAGE.			PAGE.
Agricultural Ins. Co., Smith v.	518		Bruce, Wetmore v.	319	
Alberti v. N. Y., L. E & W. R.			Buffalo Cemetery Ass'n v. City		
R. Co.	77		of Buffalo.	61	
Alentown Mfg. Co., Heller v.	683		Buffalo, City of, Buffalo Ceme-		
American Exchange Nat. Bk.,			tery Ass'n, v.	61	
Northrup v.	681		Bullard, Patton v.	669	
Andrews, Van Orden v.	674		Burns, Van Cleaf v.	549	
Atkins, Bigler v.	671		Button v. Rathbone.	666	
Attrill, Hatch v.	383				
Attrill, Huntington v.	365				
B.			C.		
Baillie, Hooper v.	413		Campbell, Holcomb v.	46	
Baker v. Manhattan R. Co.	533		Campbell v. Wright.	594	
Ball, Cowenhoven v.	231		Carpenter v. Jones.	670	
Banta, Beeman v.	538		Chapman v. N. Y. L. Im. Co.	288	
Barney v. Forbes.	580		City of Brooklyn, Murphy v.	575	
Barrett v. State of N. Y.	660		City of Brooklyn, Van Wyck-		
Baumann v. Pinckney	604		len v.	424	
Bay State S. & L. Co., Hartwig v.	664		City of Buffalo, Buffalo Ceme-		
Bedford, Haberstro v.	187		tery Ass'n. v.	61	
Beeman v. Banta.	538		Clark v. Fosdick.	7	
Bigler v. Atkins	671		Clark v. Hyatt.	563	
Bingham v. Goshen Nat. Bk.	349		Clark, Hyatt v.	563	
Bingham, Goshen Nat. Bk. v.	349		Cohn, Coudert v.	309	
Block, Rosenberg v.	329		Corn Exchange Bk. v. F. N. Bk.		
Bovee v. Lowry	681		of Lancaster	443	
Bowe, Davis v.	55		Coudert v. Cohn.	309	
Boyce v. Manhattan R'way Co.	314		Cowenhoven v. Ball.	231	
Brennan v. Gordon	489		Crane v. McDonald.	648	
Broadway & Seventh Ave. R. R.			Cruikshank v. Gordon.	178	
Co., Robinson v.	678		Culver, Leverich v.	685	
Brookhaven, Trustees, etc.,					
Town of, v. Smith.	634				
Brooklyn, City of, Murphy v.	575				
Brooklyn, City of, Van Wyck-					
len v.	424				
Brown, Franklin v.	110				
			D.		
			Daly v. Sanders.	688	
			Daly v. Stetson.	269	
			Davidson, Fredericks v.	663	
			Davis v. Bowe.	55	
			Davis v. Davis.	411	
			Deering v. Starr.	665	
			DeGraaf v. Wyckoff.	1	

	PAGE.	H.	PAGE.
D. & H. C. Co., Pres't., etc.		Haack v. Weicken	67
Draper v.	118	Haberstro v. Bedford	187
Deverell, People ex rel. v. M. M.		Halpin v. Phenix Ins. Co.	165
P. Union	101	Hamill v. Roberts	673
Douglas v. Merch'ts Ins. Co.	484	Hartwig v. Bay State S. & L. Co.	664
Doyle v. Rector, etc., Trinity		Hatch v. Attrill	383
Church	678	Hawley, Rose v.	502
Draper v. Pres't, etc., D. & H.		Hays, Spiegel v.	660
C. Co.	118	Heins, Wollreich v.	680
D. D., E. B. & B. R. R. Co.,		Heller v. Allentown Mfg. Co.	683
Uransky v.	304	Herold v. Manhattan R. Co.	686
Dunham v. Townshend	281	Hess, Rope v.	668
		Hibbard v. Ramsdell	38
E.		Hicks, Holdridge v.	687
Eighth Ave. R. R. Co., Mayor,		Hill v. Palmer	677
etc., N. Y. v.	889	Hoffman, Tabor v.	30
Elliott, Hovey v.	124	Holbrook, Warren C. & M. Co. v.	586
Eureka Mower Co., Mather v.	629	Holcomb v. Campbell	46
		Holdridge v. Hicks	687
F.		Hooper v. Baillie	413
Fairbank Canning Co. v. Metz-		Horr v. R., W. & O. R. R. Co. ...	674
ger	260	Hovey v. Elliot	124
Fales, Morris v.	670	Haveli v. Manuaring	682
Farley v. U. L. Ins. Co.	685	Hoyt v. N. Y., L. E. & W. R. R. Co.	399
Farmers' Nat. Bk., Corn Ex-		Huntington v. Attrill	365
change Bank v.	443	Hurd, Flynn v.	19
Fayerweather v. Phenix Ins.		Hyatt v. Clark	563
Co.	324	Hyatt, Clark v.	563
Ferry v. Manhattan R. Co.	497		
Flahkill, Town of, Phillips v.	678	I.	
Flynn v. Hurd	19	In re Ladue	213
Flynn v. Whipple	659		
Folts v. State of N. Y.	406	J.	
Forbes, Barney v.	580	Jolans T. E. & B. v. Thurber ..	684
Fosdick, Clark v.	7	Jones, Carpenter v.	670
Franklin v. Brown	110		
Frear v. Sweet	454	K.	
Fredericks v. Davidson	663	Keeler, Selleck v.	676
		King, St. Nicholas Bk. v.	687
G.		Kinney, Williams v.	679
Gillett v. Gillett	672	K. & M. M. Co., W. & G. S. M. Co. v.	677
Gordon, Brennan v.	489	Kursheedt v. U. D. S. Inst'n. ..	558
Gordon, Cruikshank v.	178		
Gordon v. Niemann	152	L.	
Goshen Nat. Bk. v. Bingham ..	349	Ladue, In re	213
Goshen Nat. Bk., Bingham v.	349	Lehr v. S. & H. P. R. R. Co.	556
Greenbush, Vil. of, Wiltse v.	659	Leverich v. Culver	685
		Lowry, Borce v.	681

vii

M.	PAGE.	N. Y., L. E. & W. R. R. Co.,	PAGE.
McClure v. N. Y. C. & H. R. R. Co.	671	Alberti v.	77
McCord v. Town of Ossining.	686	N. Y., L. E. & W. R. R. Co.,	
McDonald, Crane v.	648	Hoyt v.	399
McIntyre, O'Donnell v.	156	N. Y. L. Im. Co. v. Chapman. .	288
Manhattan L. Ins. Co., Peck-		N. Y., Mayor, etc., v. Eighth Ave.	
ham v.	668	R. R. Co.	389
Manhattan R. Co., Boyce v.	814	N. Y., State of, Barrett v.	660
Manhattan R. Co., Ferry v.	497	N. Y., State of, Folts v.	406
Manhattan R. Co., Herold v.	686	N. Y., State of, Nuggins v.	660
Manhattan R. Co., Baker v.	533	Nichols, Read v.	224
Manwaring, Howell v.	682	Niemann, Gordon v.	152
Martin v. Rector.	476	Northridge v. Moore.	419
Mather v. Eureka Mower Co.	629	Northrop v. Smith.	682
Matter of Ladue.	218	Northrup v. Am. Ex. Nat. Bk. .	681
Mattheissen v. Stafford.	666	Nuggins v. State of N. Y.	660
Mayor, etc., N. Y. v. Eighth Ave.			
R. R. Co.	389	O.	
Merchants' Ins. Co, Douglas v. .	484	O'Donnell v. McIntyre.	156
Met. El. R. Co., Newman v.	618	O. S. S. Co., Miller v.	199
Metzger, Fairbank Canning Co.		Ossining, Town of, McCord v.	686
v.	260		
Millard, Taylor v.	244	P.	
Miller v. O. S. S. Co.	199	Palmer, Hill v.	677
Moore, Northridge v.	419	Patton v. Bullard.	669
Mooros v. Townshend.	675, 679	Peckham v. Man. L. Ins. Co.	668
Morris v. Fales.	670	People ex rel., Deverell v. M. M.	
Murphy v. City of Brooklyn. .	575	P. Union.	101
Murphy v. N. Y. C. & H. R. R.		Phenix Ins. Co., Fayerweather v.	324
R. Co.	527	Phenix Ins. Co., Halpin v.	165
Murphy v. Ross.	676	Phillips v. Rouss.	680
M. M. P. Union, People ex rel.,		Phillips v. Town of Fishkill. .	673
Deverell v.	101	Pinckney, Baumann v.	604
M. B. L. Ass'n., Wright v.	287	Potter v. N. Y. Inf't Asylum. .	684
		Pres't, etc., D. & H. C. Co.,	
		Draper v.	118
N.			
Nat. City B'k. B'klyn. v. West-		Q.	
cott.	468	Quinlin v. Raymond.	670
Newman v. Met. El. R. Co.	618		
N. Y. C. & H. R. R. R. Co.,		R.	
McClure v.	671	Ramsdell, Hibbard v.	36
N. Y. C. & H. R. R. R. Co.,		Rathbone, Button v.	668
Murphy v.	527	Raymond, Quinlin v.	670
N. Y. C. & H. R. R. R. Co.,		Read v. Nichols.	224
Smith v.	645	Rector, Martin v.	476
N. Y. Infant Asylum, Potter v.	684	Rector, etc., Trinity Church,	
		Doyle v.	678

	PAGE.		PAGE.
Reynolds, Vail v.....	297	Thomson v. Sanders.....	252
Roberts, Hamill v.....	673	Thurber, Jolsens T. E. & B. v..	684
Roberts, Wright v.....	672	Todd v. U. D. S. Instn.....	337
Robinson v. B'dw'y & Seventh Ave. R. R. Co.....	678	Town of Brookhaven, Trustees, etc., v. Smith.....	634
Rogers, Smith v.....	675	Town of Fishkill, Phillips v.....	673
R., W. & O. R. R. Co., Horr v..	674	Town of Ossining, McCord v....	686
Rope v. Hess.....	668	Townshend, Dunham v.....	281
Rose v. Hawley.....	502	Townshend, Moores v.....	675, 679
Rosenberg v. Block.....	329	Trinity Church, Rector of, Doyle v.....	678
Ross, Murphy v.....	676	Trustees, etc., Town Brookhaven v. Smith.....	634
Rouss, Phillips v.....	680		
Rubino v. Scott.....	662		
S.		U.	
St. Nicholas Bk. v. King.....	687	U. D. S. Instn., Kursheedt v ...	358
Sanders, Daly v.....	688	U. D. S. Instn., Todd v.....	337
Sanders, Thomson v.....	252	U. L. Ins. Co., Farley v.....	685
Sanford v. Standard Oil Co....	571	Uransky v. D. D., E. B. & B. R. R. Co.....	304
Schwannecke, Slattery v.....	543		
Scott, Rubino v.....	662		
S. U. & N. Ins. Co. Von Wien v.	94	V.	
Selleck v. Keeler.....	676	Vail v. Reynolds.....	297
Slattery v. Schwannecke.....	543	Van Cleaf v. Burns.....	549
Smith v. Agricultural Ins. Co....	518	Van Orden v. Andrews.....	674
Smith v. N. Y. C. & H. R. R. R. Co.....	645	Van Wycklen v. City of Brook- lyn.....	424
Smith, Northrop v.....	682	Vil. of Greenbush, Wiltsie v....	659
Smith v. Rogers.....	675	Von Wien v. S. U. & N. Ins. Co.	94
Smith, Trustees, etc., Town of Brookhaven v.....	634		
Spiegel v. Hays.....	660	W.	
Stafford, Mattheissen v.....	666	Warren C. & M. Co. v. Holbrook	586
Standard Oil Co., Sanford v....	571	Weicken, Haack v.....	67
Starr, Deering v.....	665	Westcott, Nat. City Bk. Brook- lyn v.....	468
State of N. Y., Barrett v.....	660	Wetmore v. Bruce.....	319
State of N. Y., Folts v.....	406	Whipple, Flynn v.....	659
State of N. Y., Nuggins v.....	680	W. & G. S. M. Co. v. K. & M. Mfg. Co.....	677
S. & H. P. R. R. Co., Lehr v..	556	Williams v. Kinney.....	679
Stetson, Daly v.....	269	Wiltsie v. Vil. of Greenbush....	659
Sweet, Frear v.....	454	Wollreich v. Heins.....	680
		Wright, Campbell v.....	594
T.		Wright v. M. B. L. Ass'n.....	237
Tabor v. Hoffman.....	30	Wright v. Roberts.....	672
Taylor v. Millard.....	244	Wyckoff, DeGraaf v.....	1

TABLE OF CASES

CITED IN THE OPINIONS REPORTED IN THIS VOLUME.

A.		PAGE.
Abbott v. Shawmut M. F. Ins. Co.	3 Allen, 218.	525
Adams v. Mills.	60 N. Y. 539.	568, 569
Albion Lead W'ks v. Wms'bgh City F. Ins. Co.	2 Fed. Rep. 488.	174
Alexander v. Jones.	64 Iowa, 207.	570
Allen v. Affleck	64 How. Pr. 380.	14
Allen v. Coit	6 Hill, 318.	380
Allen v. Mercht's Bk	22 Wend. 215.	447, 448
Allerton v. Allerton.	50 N. Y. 670.	302
Archer v. N. Y. N. H. & H. R. R. Co.	106 N. Y. 589, 603	88
Armour v. M. C. R. R. Co.	65 N. Y. 111, 122.	641
Ashworth v. B. M. F. Ins. Co.	112 Mass. 422.	174
Atkinson v. Manks.	1 Cow. 691, 703	664
Attenborough v. London, etc., Dock Co.	L. R. (3 C. P. Div.) 450.	657
Atty.-Gen'l. v. Cont. L. Ins. Co.	71 N. Y. 825.	453
Aubery v. Fiske.	36 N. Y. 47.	448, 450
Austin v. Ahearne.	61 N. Y. 6.	162, 164
Ayrault v. Pacific Bk	47 N. Y. 570.	447

B.		
Babcock v. Beman.	11 N. Y. 200.	474
Bacon v. Van Schoonhoven.	87 N. Y. 446.	464
Badeau v. Tyler.	1 Sandf. Ch. 270.	656
Bailey v. Co. of Buchanan.	115 N. Y. 297.	176, 177
Baird v. Daly.	68 N. Y. 547, 551.	429, 438
Baird v. Walker.	12 Barb. 298.	688
Baker v. Barney.	8 J. R. 72.	18
Baker v. Drake.	58 N. Y. 211.	602
Balchan v. Crawford.	1 Sandf. Ch. 380.	655
Baldwin v. Hartford F. Ins. Co.	60 N. H. 422.	528
Ball v. Larkin.	3 E. D. Smith, 555.	688
Ball v. Taylor.	1 Carr. & P. 417.	347
B. & M. R. R. Co. v. Arthur.	10 Abb. N. C. 147.	656
Bank of Buffalo v. Boughton.	21 Wend. 57.	194
Bank of Commerce v. Union Bk.	3 N. Y. 230.	473
Bank of Genesee v. Patchin Bk.	19 N. Y. 312.	474
Bank of U. S. v. Davis.	2 Hill, 451.	569
Barker v. Prentiss.	6 Mass. 480.	452
Barnard v. Viele.	21 Wend. 88.	194

TABLE OF CASES CITED.

		PAGE
Barrett v. Failing.....	111 U. S. 523.....	558
Barril v. C. I. & W. Co.....	50 Hun, 257.....	682
Bates v. Rosekrans.....	37 N. Y. 409.....	6
Beck v. Carter.....	68 N. Y. 283.....	578, 579
Beck v. Sheldon.....	48 N. Y. 365.....	268
Becker v. Boon.....	61 N. Y. 322.....	178
Becker v. Howard.....	66 N. Y. 5.....	162, 163
Bedell v. Hoffman.....	2 Paige 199.....	656
Bedlow v. N. Y. F. D. D. Co.....	112 N. Y. 369.....	172
Beebe v. Estabrook.....	79 N. Y. 246, 252.....	555
Beers v. Hendrickson.....	45 N. Y. 665.....	60
Bell v. Hunter.....	3 Barb. Ch. 391.....	656
Bellamy v. Sabine.....	1 DeGex & J. 566, 578.....	135
Bellinger v. N. Y. C. R. R. Co.....	23 N. Y. 42.....	429, 430
Bennett v. Bates.....	94 N. Y. 354, 362.....	54, 462
Bennett v. Matthews.....	64 Barb. 410.....	186
Benton v. Pratt.....	2 Wend. 385.....	294
Bergold v. Puchta.....	2 T. & C. 532.....	183
Berrey v. Lindley.....	3 M. & G. 496.....	312
Biddlecom v. Newton.....	13 Hun, 582.....	234
Bigler v. Morgan.....	77 N. Y. 312.....	423
Bissell v. N. Y. C. R. R. Co.....	23 N. Y. 61.....	219, 220, 222
Blake v. Griswold.....	103 N. Y. 429.....	380
Blewett v. Baker.....	58 N. Y. 611.....	616
Bogart v. Brown.....	5 Pick. 18.....	633
Bonnell v. Griswold.....	89 N. Y. 122.....	376
Booth v. Bierce.....	40 Barb. 114, 136.....	475
Borst v. Corey.....	15 N. Y. 505.....	135
Bowen v. Mandeville.....	95 N. Y. 237, 240.....	296
Bowen v. N. Y. C. R. R. Co.....	18 N. Y. 408.....	206, 499
Bowen v. Owen.....	11 Q. B. 130.....	176
Boyd v. DeLa Montagnie.....	73 N. Y. 498.....	74
Boynton v. Andrews.....	63 N. Y. 93.....	376
Breen v. N. Y. C. & H. R. R. Co.....	109 N. Y. 297.....	209, 499
Brennan v. Gordon.....	13 Daly, 208, 210.....	494
Briggs v. Hilton.....	99 N. Y. 517.....	266, 268, 269
Briggs v. Merrill.....	58 Barb. 389.....	234
Briggs v. Partridge.....	64 N. Y. 363.....	475
Broadway v. State.....	8 Blackf. 290.....	513
Brooklyn Bk. v. De Grauw.....	23 Wend. 342.....	176
Brown v. Eaton.....	21 Minn. 409.....	617
Brown v. Haff.....	5 Paige, 235.....	612
Brown v. Peoples' M. Ins. Co.....	11 Cush. 280.....	525
Brown v. Sprague.....	5 Denio, 545.....	641
Buel v. Boughton.....	2 Denio, 91.....	142
Buffalo City Cemetery v. City of } Buffalo.....	48 N. Y. 506.....	65

TABLE OF CASES CITED.

xi

		PAGE.
Buffum v. Harris	5 R. I. 243.....	433, 438
Bunge v. Koop.....	48 N. Y. 225.....	616
Burt v. Place	4 Wend. 591.....	286
Burwell v. Jackson.....	9 N. Y. 535.....	422
Bush v. Lathrop.....	22 N. Y. 535.....	186, 358, 462
Butler v. Johnson.....	111 N. Y. 204.....	150
Butler v. Tomlinson.....	38 Barb. 641.....	363
Byrnes v. City of Cohoes.....	67 N. Y. 205.....	234
Byxbie v. Wood.....	24 N. Y. 607.....	335

C.

Calder v. Billington.....	15 Me. 398.....	355
Caldwell v. Murphy.....	11 N. Y. 416.....	83
Caldwell v. N. J. St. B't. Co.....	47 N. Y. 282	206, 499
Calkins v. Long.....	22 Barb. 97, 98.....	12, 13, 14
Campbell v. Woodworth.....	20 N. Y. 499.....	381
Canal Bk. v. Bk. Albany.....	1 Hill, 287.....	473
Carleton v. Darcy.....	90 N. Y. 566, 578.....	288
Carman v. Pultz.....	21 N. Y. 547.....	178
Carpenter v. Manh. L. Ins. Co.....	93 N. Y. 552.....	259
Carpenter v. Osborn.....	102 N. Y. 552, 559.....	14, 17
Carr v. Sterling.....	114 N. Y. 588,	194
Carson v. Godley.....	26 Penn. St. 117.....	114
Carson v. Murray	3 Paige, 483.....	13, 14
Carstairs v. Mechanics & T'r. Ins. Co.	18 Fed. Rep. 473.....	329
Casco Bk. v. Keene.....	53 Me. 103.....	640
Cass v. Higenbotam.....	100 N. Y. 253.....	176
Castle v. Beardsley.....	10 Hun, 343.....	585
Castle v. Noyes	14 N. Y. 329.....	257
Caulkins v. Bolton.....	31 Hun, 458; 98 N. Y. 511	656
Chadwick v. Woodward.....	13 Abb. N. C. 441.....	114
Chamberlain v. Bell.....	7 Cal. 292; 68 Am. Dec. 260.....	346
Chanoine v. Fowler.....	3 Wend. 173.....	553
Chapin v. School Dist	35 N. H. 445.....	513
Charlesworth v. Holt.....	43 L. J. (N. S.) part 2, Exch. 25.....	17
Chase v. Peck.....	21 N. Y. 581.....	143
Chasemore v. Richards.....	7 H. L. Cas. 349.....	428
C. & N. R. Co. v. Bayfield.....	37 Mich. 205.....	82
Church v. Brown.....	21 N. Y. 331.....	585
City Bk. New Haven v. Perkins.....	29 N. Y. 554.....	450
Clapp v. Schutt.....	44 N. Y. 154.....	197
Clark v. Callison.....	7 Ill. 263.....	355, 356
Clark v. Dillon.....	97 N. Y. 370.....	474
Clark v. Farrow.....	10 B. Mon, 446; 52 Am. Dec. 552.....	134
Clark v. Session.....	23 N. Y. 312.....	358
Clark v. Whitaker.....	50 N. H. 474	355, 356
Clemens v. Balford.....	14 Fed. Rep. 728.....	35

		PAGE.
Cleves v. Willoughby	7 Hill, 88.....	118, 115
Cockcroft v. N. Y. & H. R. R. Co. ...	69 N. Y. 201.....	323, 422
Coe v. Tough	116 N. Y. 278.....	584
Colrick v. Swinburne.....	8 N. Y. S. R. 173	410
Commercial Bk. v. Marine Bk.	1 Abb. Ct. Ap. Dec. 405 ..	450, 451
Commercial Bk., Penn., v. Union Bk.	11 N. Y. 203.....	447
Comm. v. Choate.....	105 Mass. 456	433
Comstock v. Hoag	5 Wend. 600	452
Conger v. Weaver.....	20 N. Y. 140.....	422
Connecticut F. Ins. Co. v. Erie R. Co.	73 N. Y. 899.....	327
Connolly v. Poillon.....	41 Barb. 866, 869	494
Connolly v. Smith	21 Wend. 61	364
Constant v. Un. of Rochester.....	111 N. Y. 604.....	548
Cont. Nat. Bk. v. Nat. Bk. Comm. ...	50 N. Y. 575	640, 641
Cook v. Freudenthal.....	80 N. Y. 202.....	195
Coplay Iron Co. v. Pope.....	108 N. Y. 232	264, 268
Corbin v. Jackson.....	14 Wend. 621, 625	250
Corkings v. State.....	99 N. Y. 499.....	409
Corn Exch. Bk. v. Nassau Bk.	91 N. Y. 74	473
Corning v. Southland	3 Hill, 552	61
Cornish v. F. B. F. Ins. Co.	74 N. Y. 296	429
Cornwell v. Haight.....	21 N. Y. 462.....	616
Coulson v. Whiting	14 Abb. N. C. 60.....	114
Cowing v. Altman	79 N. Y. 167.....	55
Cox v. James	45 N. Y. 557	170, 171
Craig v. Wells	11 N. Y. 315.....	511
Crary v. Smith.....	2 N. Y. 60.....	613
Crocheron v. N. S. S. I. F. Co.	56 N. Y. 656	405
Cronkhite v. Cronkhite	94 N. Y. 323	251
Cruger v. McLaury	41 N. Y. 219	483
Cummins v. Agr. Ins. Co.	67 N. Y. 260.....	173
Curtis v. Gokey.....	68 N. Y. 426.....	442
Cutler v. Goold	43 Hun, 516	176, 177
Cutler v. Wright.....	22 N. Y. 472.....	553

D.

Dacey v. Agr. Ins. Co.	21 Hun, 83	526
Darling v. Westmoreland.....	52 N. H. 401.....	405
Davis v. Bechstein	69 N. Y. 440.....	462
Davis v. Mayor, etc	14 N. Y. 506.....	398
Davis v. Spencer.....	24 N. Y. 386, 391.....	54
Day v. Pool.....	52 N. Y. 416	268, 269
Day v. Town of New Lots.....	107 N. Y. 157.....	286
Dean v. VanNostran	23 N. Y. W. Dig. 97	208
Decker v. Boice	83 N. Y. 215	462, 547
Denton v. Nanny	8 Barb. 618	364
Detweiler v. Groff.....	10 Penn. St. 377	433, 438

TABLE OF CASES CITED.

xiii

		PAGE.
Dey v. Nason	100 N. Y. 166.....	423
Dezell v. Odell.....	3 Hill, 215	641
Dickerson v. Wason	47 N. Y. 439.....	450
Dillon v. Cockcroft.....	90 N. Y. 649.....	473
Distin v. Rose.....	69 N. Y. 122.....	185
Divine v. McCormick.....	50 Barb. 116	267
Dobiecki v. Sharp.....	88 N. Y. 203	318
Dod v. Fourth Nat. Bk.....	59 Barb. 265	453
Doe v. Bell	5 D. & E. 471	811, 812
Doe v. Dobell	1 A. & E. (N. R.) 806.....	812
Doe v. Roe.....	32 Hun, 628.....	186
Doe v. Stratton.....	4 Bing. 446	313
Doll v. Earle.....	65 Barb. 298	26
Dorn v. Fox	61 N. Y. 268, 270	654, 655, 656
Doty v. Brown.....	4 N. Y. 71.....	257
Dougan v. C. T. Co	56 N. Y. 7.....	405
Douglass v. Ireland	73 N. Y. 100.....	376
Dounce v. Dow	57 N. Y. 16	268
Drake v. Seaman.....	97 N. Y. 230.....	585
Dresser v. Brooks	3 Barb. 429	236
Drucker v. Manh. R. Co.....	106 N. Y. 157.....	626
Duffy v. O'Donovan.....	46 N. Y. 223	616, 617
Dupre v. Rein	7 Abb. N. C. 256.....	14
Durant v. Abendroth.....	69 N. Y. 148.....	234
Dutton v. Gerrish.....	9 Cush. 89	114

E.

Edwards v. N. Y. & H. R. R. Co....	98 N. Y. 245, 248, 249.....	113, 114, 116
Ehrgott v. Mayor, etc.....	96 N. Y. 275.....	308
Emerson v. Lowell G. L. Co	6 Allen, 146.....	438
Emott's Case.....	Dyer, 212b.....	117
Ernst v. H. R. R. Co.....	35 N. Y. 9	319
Essex Co. Bk. v. Russell.....	29 N. Y. 673.....	233
Evans v. Gale.....	17 N. H. 573.....	302
Evansville Nat. Bk. v. Kaufmann...	93 N. Y. 273.....	535
Exchange Nat. Bk. Pittsburgh v. } Third Nat. Bk..... }	112 U. S. 276.....	447
Ex parte Railroad Co	95 U. S. 221.....	134

F.

Fairbanks v. Sargent.....	104 N. Y. 108.....	358
Falis v. Conway M. F. Ins. Co.....	7 Allen, 46.....	525
Farmers' M. N. Bk. v. King.....	57 Penn. St. 202.....	450
Faxton v. Faxon.....	28 Mich. 159.....	641
Fenner v. B. & S. L. R. R. Co.....	44 N. Y. 505.....	120
Ferguson v. Hubbell.....	97 N. Y. 507, 513.....	429, 430, 439, 440
Fero v. Ruscoe.....	4 N. Y. 165.....	186

		PAGE.
Ferry v. Sampson.....	112 N. Y. 415.....	342
Field v. Mayor, etc.....	6 N. Y. 179, 187.....	143
First Nat. Bk. Ballston Spa. v. Bd. } Supr's. Sar. Co. }	106 N. Y. 488.....	26
First Nat. Bk. v. Dana.....	79 N. Y. 108, 110.....	301
First Nat. Bk. v. Tisdale.....	84 N. Y. 655.....	380
Fitzgerald v. Redfield.....	51 Barb. 484.....	183
Fleming v. Burnham.....	100 N. Y. 1.....	342
Fletcher v. Button.....	4 N. Y. 396.....	342
Fletcher v. Ferrel.....	9 Dana, 372; 85 Am. Dec. 126...	135
Flower v. Lance.....	59 N. Y. 609.....	26
Flowerly M. Co. v. North B. M. Co..	16 Nev. 302.....	347
Folkes v. Chadd.....	3 Dougl. 157.....	437
Ford v. Monroe.....	20 Wend. 210.....	178
Foster v. Hepburn.....	48 N. Y. 41.....	235
Franklin Bk. v. Raymond.....	3 Wend. 69.....	355
Fraser v. Tupper.....	29 Vt. 409.....	441
French v. Carhart.....	1 N. Y. 96.....	219
Freund v. Importers & Tr. Bk.....	76 N. Y. 352.....	355, 357
Frost v. Beekman.....	1 J. Ch. 288; 18 J. R. 544.....	346
Fuller v. Scribner.....	76 N. Y. 190.....	362

G.

Gardner v. Heartt.....	3 Denio, 232.....	139, 140
Gawtry v. Doane.....	51 N. Y. 84.....	387
Geary v. City of Kansas.....	61 Mo. 378.....	347
German Ex. B'k v. Comm's of Excise.	6 Abb. N. C. 394.....	656
Gifford v. First Presb. Soc'y	56 Barb. 114.....	219
Gilbert v. Sharp.....	2 Lans, 412.....	355, 356
Gill v. N. Y. C. Co.....	48 Hun, 524.....	632
Goodrich v. McDonald.....	112 N. Y. 157.....	655
Goodtitle v. Braham.....	4 T. R. 498.....	437
Goodwin v. Bunzl.....	102 N. Y. 224.....	194
Gouge v. Roberts.....	53 N. Y. 619.....	379
Gould v. Cayuga Co. Nat. Bk	86 N. Y. 75.....	302
Gould v. Cayuga Co. Nat. Bk	99 N. Y. 333.....	259, 295
Grant v. Budd.....	30 L. T. R. 319.....	17
Green v. Folgham.....	1 Sim. & Stu. 398.....	36
Green v. Rick.....	{ 121 Penn St. 130; 6 Am. St. R. 760.....	134
Green v. Roworth.....	113 N. Y. 462.....	71
Greenfield v. Mass. M. L. Ins. Co....	47 N. Y. 430.....	12
Gregory v. Morris.....	96 U. S. 619.....	137
Griswold v. N. Y. C. & H. R. R. R. Co.	44 Hun, 236; 115 N. Y. 61....	87
Gruman v. Smith.....	81 N. Y. 25.....	602
Gumb v. Twenty-third St. R. Co....	114 N. Y. 411.....	308
Guttermann v. L. N. Y. & P. St. S. Co.	83 N. Y. 358.....	432

TABLE OF CASES CITED

XV

H.

	PAGE.
Hadley v. Hadley Mfg. Co.	4 Gray 140..... 513
Haines v. Beach.....	3 J. Ch. 459..... 363
Hale v. Omaha Nat. Bk.....	49 N. Y. 626..... 136, 137, 149
Hale v. Omaha Nat. Bk.....	64 N. Y. 550..... 189, 149
Hall v. R. R. Co.....	13 Wall. 367..... 327
Halloway v. Platner.....	20 Iowa, 121; 89 Am. Dec. 517.. 346
Halpin v. Phoenix Ins. Co.....	118 N. Y. 165..... 547
Hamilton v. Wright	87 N. Y. 502..... 61
Hammer v. Barnes.....	26 How. Pr. 174..... 84, 36
Hand v. Inhabs. Brookline.....	126 Mass. 324..... 438
Hand v. Newton.....	92 N. Y. 89..... 639
Harrington v. Slade.....	22 Barb. 161..... 184, 135, 138
Harrop v. Fisher.....	30 L. J. (C. L., N. S.) 283... 355, 356
Hart v. H. R. B. Co.....	80 N. Y. 622..... 319
Hart v. Windsor.....	12 Mees. & Wels. 68..... 114
Hartel v. Holland.....	19 Wkly. Dig. 312..... 308
Haskell v. Mitchell.....	53 Me. 468..... 355, 356
Hatch v. Cobb.....	4 J. Ch. 559..... 148
Hathaway v. Cincinnatus.....	62 N. Y. 447..... 142
Havens v. Sackett.....	15 N. Y. 365, 369..... 75
Hawkins v. Pemberton.....	51 N. Y. 198..... 265, 266
Hayden v. Buckler.....	9 Paige, 512..... 363
Hays v. Hathorn.....	74 N. Y. 486..... 450
Hayward v. N. E. M. F. Ins. Co....	10 Cush. 444..... 524
Heatley v. Finster.....	2 J. Ch. 158..... 134
Hedges v. Sealy.....	9 Barb. 214, 218..... 355
Hegeman v. Western R. R. Co.....	13 N. Y. 9..... 206
Henderson v. N. Y. C. R. R. Co.....	78 N. Y. 423..... 624
Herrick v. Carman.....	10 J. R. 224..... 452
Herriman v. Adriatic F. Ins. Co.....	85 N. Y. 162..... 173, 526
Hess v. Rau.....	95 N. Y. 359..... 603
Heyn v. O'Hagan.....	60 Mich. 160..... 570
Hicks v. Hinde.....	9 Barb. 528..... 474
Higgins v. Armstrong.....	9 Col. 38..... 569
Higgins v. Dewey.....	107 Mass. 494..... 441
Hill v. P. R. R. R. Co.....	55 Me. 488..... 405
Hilton v. Fonda.....	86 N. Y. 340..... 235
Hoffman v. Conner.....	76 N. Y. 121..... 381
Hoffman v. N. Y. C. & H. R. R. R. Co.	75 N. Y. 605..... 318
Holbrook v. Utica & S. R. R. Co....	12 N. Y. 286..... 206
Hollister v. Stewart.....	111 N. Y. 644, 659..... 613
Holmes v. Drew.....	16 Hun, 491..... 526
Holsapple v. R., W. & O. R. R. Co..	86 N. Y. 275..... 241
Hook v. Pratt.....	78 N. Y. 371..... 453, 475
Hosford v. Ballard.....	89 N. Y. 147, 152..... 483
Hosford v. Nichols.....	1 Paige, 220..... 553
Howard v. Doolittle.....	3 Duer, 475..... 114

		PAGE.
Howell v. Adams	68 N. Y. 314.....	283
Hoyt v. Thompson.....	19 N. Y. 207.....	570
Hubbard v. Briggs.....	31 N. Y. 518.....	292
Hubbard v. Matthews.....	54 N. Y. 43, 50.....	683
Hubbell v. Weldon.....	Hill & Den. Supp. 139.....	163, 165
Hubbell v. Von Schoening.....	49 N. Y. 326.....	616
Hughes v. Merc. M. Ins. Co.....	44 How. Pr. 351.....	12
Hughes v. Nelson.....	29 N. J. Eq. 547.....	356, 357
Hulbert v. N. Y. C. R. R. Co.....	40 N. Y. 145.....	318
Hunter v. Sun M. Ins. Co.....	26 La. Ann. 13.....	488
Huntingdon v. Claffin.....	38 N. Y. 182.....	486
Husted v. Ingraham.....	75 N. Y. 251, 259.....	137, 139, 150
Hutchings v. Miner.....	46 N. Y. 456.....	244
Hynes v. McDermott.....	32 N. Y. 50.....	88
Hynes v. McDermott.....	91 N. Y. 451.....	51

I.

Indian Orchard Coal Co. v. Sikes.....	8 Gray, 563.....	516
Ingalls v. Morgan.....	10 N. Y. 178.....	569
Inman v. So. Carolina R. Co.....	129 U. S. 128.....	328
In re Brooklyn El. R. Co. v. Phillips.....	28 N. Y. S. R. 627.....	626
In re C. & S. V. R. R. Co.....	56 Barb. 456.....	623
In re Ensign.....	103 N. Y. 284.....	555
In re Howe.....	1 Paige, 125, 130.....	136
In re Nelley.....	95 N. Y. 383.....	135
In re N. Y. C. & H. R. R. Co. } v. Judge.....	15 Hun, 63.....	624
In re N. Y., L. & W. R. Co.....	29 Hun, 1.....	624
In re N. Y., L. & W. R. Co.....	49 Hun, 539.....	624
In re P. P. & C. I. R. R. Co.....	13 Hun, 345.....	624
In re Sandilands.....	L. R. (6 C. P.) 411.....	347

J.

Jackson v. Bartlett.....	8 J. R. 361.....	59
Jackson v. Blodgett.....	16 J. R. 172.....	219
Jackson v. Christman.....	4 Wend. 277.....	249
Jackson v. Harder.....	4 J. R. 402.....	249
Jackson v. Hudson.....	3 J. R. 375.....	219
Jackson v. Livingston.....	7 Wend. 186.....	249
Jackson v. Losee.....	4 Sandf. Ch. 381.....	134, 135
Jackson v. Sellick.....	8 J. R. 270.....	249
Jackson v. Stone.....	13 J. R. 447.....	134
Jackson Co. v. Boylston M. Ins. Co.....	139 Mass. 508.....	328
Jacobs v. Eagle M. F. Ins. Co.....	7 Allen, 132.....	525
Jaffe v. Harteau.....	56 N. Y. 398.....	113
James v. Cowing.....	32 N. Y. 449.....	616
Jarvis v. Sewall.....	40 Barb. 449.....	286

TABLE OF CASES CITED.

xvii

	PAGE.
Jee v. Thurlow	2 Barn. & Cress. 547..... 17
Jencks v. Smith.....	1 N. Y. 90..... 178
Johnson v. H. R. R. R. Co.....	20 N. Y. 65..... 319
Johnson v. N. Y. B. F. Ins. Co.....	39 Hun, 410..... 178
Johnston v. Oppenheim	55 N. Y. 291..... 284
Johnston v. Stimmel.....	89 N. Y. 117..... 656
Jones v. Martin.....	16 Cal. 165..... 847
Jones v. Mayor, etc.....	90 N. Y. 387..... 187

K.

Keeler v. Davis.....	5 Duer, 507..... 488
Keith v. Q. M. F. Ins. Co.....	10 Allen, 228..... 174
Kelley v. N. & A. H. R. R. Co.....	141 Mass. 496..... 567
Kellogg v. Gilbert.....	10 J. R. 220..... 59
Kelly v. Manh. R. Co.....	112 N. Y. 443..... 211
Kempshall v. Stone.....	5 J. Ch. 193..... 148
Kenada v. Gardner.....	8 Barb. 589..... 44
Kent v. Friedman.....	{ 17 Wkly. Dig. 484; 101 N. Y. 616..... 265, 266
Kent v. Kent	62 N. Y. 560..... 593
Kent v. Lincoln	32 Vt. 591..... 405
Kiernan v. M. Q. Tel. Co.	50 How. Pr. 194..... 34
Kilpatrick v. Penrose Ferry Br. Co..	49 Penn. St. 118..... 632
Kings Co. F. Ins. Co. v. Stevens...	87 N. Y. 287..... 219
Klinck v. Colby.....	46 N. Y. 427..... 184, 186
Klump v. Gardner.....	114 N. Y. 153..... 419
Knapp v. Simon.....	96 N. Y. 284, 292..... 55
Knapp v. Smith.....	27 N. Y. 277, 282..... 460
Knatchbull v. Hallett.....	{ L. R. (13 Ch. Div.) 696; 86 Eng. R. 779..... 184
Kniffen v. McConnell.....	30 N. Y. 285..... 186
Knowlton v. Fitch.....	52 N. Y. 288..... 603
Kremelberg v. Kremelberg.....	52 Md. 553..... 17
Krumm v. Beach.....	96 N. Y. 398, 406..... 301, 303

L.

Lacustrine F. Co. v. Lake Guano F. Co.	82 N. Y. 476..... 546
LaFranc v. Richmond	5 Sawyer, 603..... 347
Lamont v. Cheshire	65 N. Y. 30, 36..... 138, 363
Lancaster Nat. Bk. v. Taylor	100 Mass. 18..... 355
Lane v. Hitchcock.....	14 J. R. 213..... 139, 149
Langdon v. Middagh.....	2 Abb. L. J. 70..... 513
Lattimer v. Livermore.....	72 N. Y. 174..... 323
Laughran v. Smith.....	75 N. Y. 205, 209..... 311, 313
Laverty v. Snethen.....	68 N. Y. 522..... 334
Lawrence v. Miller	2 N. Y. 251..... 364
Lawrence v. Miller.....	86 N. Y. 131..... 616

		PAGE.
Leeds v. M. G. L. Co.	90 N. Y. 26	109, 537
Leggett v. M. L. Ins. Co	53 N. Y. 394	422
Leopold v. VanKirk	27 Wis. 152	268
Lindauer v. Fourth Nat. Bk	55 Barb. 75	453
Litchutt v. Treadwell ...	7 Wkly Dig. 83; 74 N. Y. 608 ..	259
Livingston v. TenBroeck	16 J. R. 14	219
Loan Ass'n v. Stonemetz	29 Penn. St. 524	632
Loubat v. Leroy	40 Hun, 546, 552	108
Loughlin v. State of N. Y	105 N. Y. 159, 163	494
Lowery v. Manh. R. Co	99 N. Y. 158	229, 230
Lynch v. First Nat. Bk. Jersey City.	107 N. Y. 183	357
Lynde v. Johnson ...	39 Hun, 12	183
Lyons v. E. R. Co.	57 N. Y. 489, 490	88, 88

M.

McBride v. Farmers' Bk.	26 N. Y. 450	453
McCaffrey v. Woodin	65 N. Y. 459	136, 187
McCain v. Brooklyn C. R. R. Co.	116 N. Y. 459	87
McCulloch v. Norwood	58 N. Y. 562	553
McKay v. Draper ...	27 N. Y. 256	448, 450
McKelway v. Seymour	29 N. J. L. 321	513
McKenna v. Edmundstone	91 N. Y. 231	67
Mann v. D. & H. C. Co.	91 N. Y. 500	494
Mann v. Everston	32 Ind. 355	268
Manning v. Monaghan	23 N. Y. 539	149
Mansfield v. McIntyre	10 Ohio, 27	553
Man'fr's. & Tr. Bk. v. Hazard	30 N. Y. 226	640
Mark v. City of Buffalo	87 N. Y. 184	86
Marks v. King	64 N. Y. 628	387
Marshall v. Meech	51 N. Y. 140	59
Marston v. Gould	69 N. Y. 220	458
Martino v. Commerce F. Ins. Co.	15 J. & S. 520	487
Marvin v. Wilber	52 N. Y. 270	614
Mason v. Lord	40 N. Y. 477	170
M. M. Ins. Co. v. Calebs	20 N. Y. 173	328
Matson v. F. B. Ins. Co.	73 N. Y. 310	233
Matter Coleman	11 N. Y. 220	86
Mattocks v. Young	66 Me. 459	617
Mayor, etc., v. B. & S. A. R. R. Co. ..	97 N. Y. 275	397, 398
Mechanics' Bk. v. N. Y. & N. H. R. } R. Co.	18 N. Y. 638	358
Meehan v. Forrester	52 N. Y. 277	569
Meeks v. Bowerman	1 Daly, 99	114
Merrill v. Agr. Ins. Co.	73 N. Y. 452	526
Metcalfe v. Archbishop of York	1 Mylne & C. 547	136
M. E. Ch. Home v. Thompson	108 N. Y. 618	342
Milhau v. Sharp	27 N. Y. 611	398
Milliman v. Neher	20 Barb. 37	136

TABLE OF CASES CITED.

xix

		PAGE.
Mills v. Hunt.....	20 Wend. 431.....	475
Mills v. Van Voorhies.....	20 N. Y. 412.....	364
Mitchell v. Winslow.....	2 Story, 630.....	186
Moffet v. Sackett.....	18 N. Y. 528.....	303
M. & H. R. R. Co. v. Clute.....	4 Paige, 384.....	656
Montgomery Co. Bk. v. Albany City Bk.....	7 N. Y. 459.....	447, 451, 453, 473
Moody v. Osgood.....	50 Barb. 628.....	82
Moody v. Smith.....	70 N. Y. 598.....	613
Moore v. Metr. Bk.....	55 N. Y. 41.....	358
Moore v. Westervelt.....	9 Bosw. 558.....	430
Morgan v. Skidmore.....	3 Abb. N. C. 92; 55 Barb. 263..	296
Morison v. Moat.....	21 L. J. R. (N. S.) 248; 20 id. 513.	86
Morrison v. N. Y. C. & H. R. R. R. Co.	63 N. Y. 643.....	319
Morss v. Elmendorf.....	11 Paige, 287.....	148
Mott v. Mott.....	68 N. Y. 246.....	219, 222, 223
Mount v. Morton.....	20 Barb. 123.....	249
Mowatt v. Wright.....	1 Wend. 355.....	26
Moyer v. N. Y. C. & H. R. R. R. Co..	98 N. Y. 645.....	432, 433
Muller v. Pondir.....	55 N. Y. 325.....	355
Mumford v. Brown.....	6 Cow. 475.....	113
Murphy v. City of Brooklyn.....	98 N. Y. 642.....	578, 580
Murray v. Ballou.....	1 J. Ch. 566.....	134
Murray v. Lyburn.....	2 J. Ch. 441.....	134
Mut. L. Ins. Co. v. Dake.....	87 N. Y. 257, 263.....	346
Mut. L. Ins. Co. v. Wilcox.....	55 How. Pr. 43.....	464
Myers v. Malcolm.....	6 Hill, 292, 296.....	82
Myers v. Mut. L. Ins. Co.....	99 N. Y. 1, 11.....	569
Mynard v. B., S. & N. Y. R. R. Co..	71 N. Y. 180.....	241

N.

Nat. Park Bk. v. Seaboard Bk.....	114 N. Y. 28.....	474
Nat. Trust Co. v. Gleason.....	77 N. Y. 400.....	335, 337
Neftel v. Lightstone.....	77 N. Y. 96.....	655
Newbery v. Wall.....	65 N. Y. 484, 488.....	585
Newcomb v. Griswold.....	24 N. Y. 298.....	662
Newell v. Bartlett.....	114 N. Y. 399.....	231
Newman v. Anderton.....	2 B. & P. (N. R.) 224.....	117
N. Y. G. & I. Co. v. Gleason.....	78 N. Y. 503.....	335
N. Y. & H. R. R. Co. v. Marsh.....	12 N. Y. 308.....	26
N. Y. Rubber Co. v. Rothery.....	107 N. Y. 310, 316.....	641
N. Y. S. M. M. P. Co. v. Remington.	109 N. Y. 143.....	540
Noyes v. Smith.....	28 Vt. 59.....	494
Noyes v. Wyckoff.....	114 N. Y. 204.....	176

O.

O'Brien v. Capwell.....	59 Barb. 504.....	116
Ocean Nat. Bk. v. Fant.....	50 N. Y. 474.....	176, 177

		PAGE.
Olmsted v. Keyes.....	85 N. Y. 593, 599.....	244
Oneida Mfg. Soc'y. v. Lawrence....	4 Cow. 440.....	265
O'Neill v. James.....	48 N. Y. 84.....	300
Oregon C. R. R. Co. v. Wait.....	3 Oreg 91.....	627
Osgood v. Artt.....	17 Fed. Rep. 575.....	355
Osterhout v. Shoemaker.....	3 Hill 518, 518.....	44
Ostrander v. Weber.....	114 N. Y. 95.....	613
Otis v. Sill.....	8 Barb. 102.....	143

P.

Page v. Chicago R. R. Co.....	70 Ill. 324.....	626
Paine v. Agr. Ins. Co.....	5 T. & C. 619.....	173
Palmer v. DeWitt.....	47 N. Y. 532.....	34
Parks v. Morris Ax & T. Co.....	54 N. Y. 586.....	268
Parsons v. Loucks.....	48 N. Y. 17.....	593
Passinger v. Thorburn.....	34 N. Y. 634.....	541
Payne v. Wilson.....	74 N. Y. 848.....	136, 143
Peabody v. Norfolk.....	98 Mass. 452.....	35, 36
Pennell v. Deffell.....	4 DeGex, M. & G. 372.....	134
Pennsylvania Co. v. Roy.....	102 U. S. 451, 459.....	83
People v. Barber.....	115 N. Y. 475, 491.....	432
People v. Briggs.....	114 N. Y. 56.....	382
People v. Brown.....	72 N. Y. 571.....	663
People v. Crapo.....	76 N. Y. 288.....	662
People v. Irving.....	95 N. Y. 541.....	661, 662
People v. Noelke.....	94 N. Y. 137, 144.....	661, 662
People v. Rickert.....	8 Cow. 230.....	312
People ex rel. Aspinwall v. Supr's. } Richmond Co. }	28 N. Y. 112.....	109
People ex rel. Everett v. Bd. Supr's. } Ulster Co. }	93 N. Y. 397.....	27, 28
People ex rel. Merscheim v. M. M. } P. Union }	47 Hun, 273.....	108
Perkins v. Coddington.....	4 Robt. 647.....	322
Perkins v. Hill.....	56 N. Y. 87.....	170, 171
Perrin v. N. Y. C. R. R. Co.....	36 N. Y. 120.....	219
Pettitt v. Pettitt.....	107 N. Y. 667, 677.....	14, 17
Pharis v. Gere.....	112 N. Y. 408.....	427
Phillips v. Terry.....	3 Abb. Ct. App. Dec. 607.....	433
Phoenix Ins. Co. v. Cont. Ins. Co....	87 N. Y. 400.....	322
Phoenix Ins. Co. v. Erie & W. Tr. Co. . }	10 Biss. 18; 117 U. S. 312; 118 U. S. 210.....	328
Phosphate L. Co. v. Green.....	L. R. (7 C. P.) 43.....	567
Pier v. Hammore.....	86 N. Y. 95.....	376
Pierce v. Keator.....	70 N. Y. 419, 422.....	251
Pierson v. McCurdy.....	33 Hun, 521; 100 N. Y. 608	144, 149, 150
Pinch v. Anthony..	8 Allen, 536, 539.....	136

TABLE OF CASES CITED.

xxi

	PAGE.
Pinney v. Orth.....	88 N. Y. 451..... 54
Pitts v. Pitts.....	52 N. Y. 593..... 554
Platner v. Platner.....	78 N. Y. 91, 95..... 387, 458
Platt v. R. Y. R. & C. R. R. Co.....	20 J. & S. 496; 108 N. Y. 858... 328
Plumb v. Catt. C. M. Ins. Co.....	18 N. Y. 893..... 641
Pollett v. Long.....	56 N. Y. 200..... 229, 230
Pollock v. Pollock.....	71 N. Y. 137..... 170
Pope v. Allen.....	90 N. Y. 298..... 53
Porter v. Bleiler.....	17 Barb. 154..... 313
Porter v. Schepeler.....	2 Bosw. 188..... 234
Porter v. Smith.....	107 N. Y. 531..... 170, 171
Post v. Pearsall.....	22 Wend. 425, 483..... 251
Post v. Weil.....	115 N. Y. 361..... 511
Potter v. McPherson.....	21 Hun, 559..... 34
Pray v. Hegeman.....	98 N. Y. 351..... 257
Price v. Hartshorn.....	44 N. Y. 94..... 430
Price v. Powell.....	3 N. Y. 322..... 437
Priest v. Cummings.....	20 Wend. 350..... 364
Putnam v. B'dway & Seventh Ave. } R. R. Co.....	55 N. Y. 108..... 562
Putzel v. Van Brunt.....	8 J. & S. 501..... 219

Q.

Quinlan v. City of Utica.....	11 Hun, 217; 74 N. Y. 603.... 405
-------------------------------	-----------------------------------

R.

Railroad Co. v. Fort.....	17 Wall. 553..... 494
Ranck v. Albright.....	36 Penn St. 367..... 486
Raynor v. Hoagland.....	7 J. & S. 11..... 355
Real v. People.....	42 N. Y. 270, 280..... 661, 662
Reed v. McConnell.....	101 N. Y. 276..... 541
Reed v. Randall.....	29 N. Y. 858..... 268
Reed v. State of N. Y.....	108 N. Y. 407..... 408
Reeder v. Sayre.....	70 N. Y. 180, 184..... 311, 313
Rees v. Peltzer.....	75 Ill. 475..... 35
Reinmiller v. Skidmore.....	59 N. Y. 661..... 233
Reitz v. Reitz.....	80 N. Y. 538, 542..... 74
Rice v. Manley.....	66 N. Y. 82..... 294
Rice v. Peninsular Club.....	52 Mich. 87..... 614
Riggs v. Pursell.....	66 N. Y. 193..... 323
Risdon v. De La Rue.....	19 J. & S. 63; 98 N. Y. 653... 336
Ritchie v. Putnam.....	13 Wend. 524..... 286
Rogers v. Rogers.....	4 Paige, 516..... 14
Rosenberg v. Block.....	102 N. Y. 255..... 333
Ruloff v. People.....	45 N. Y. 213, 224..... 88
Ryan v. Fowler.....	24 N. Y. 410..... 494
Ryan v. N. Y. C. R. R. Co.....	35 N. Y. 210..... 229, 230
Ryan v. People.....	79 N. Y. 598..... 661
Ryeras v. Wheeler.....	25 Wend. 434..... 249

	S.	PAGE.
St. John v. Spalding	1 T. & C. 483	464
Sadler's Appeal	87 Penn. St. 154	184
Saffer v. D. D., E. B. & B. R. R. Co.	24 N. Y. S. R. 210	308
Salomon v. Hertz	40 N. J. Eq. 400	35, 36
Saunders v. Frost	5 Pick. 259	176, 177
Sauter v. N. Y. C. & H. R. R. R. Co.	66 N. Y. 50	89
Savage v. King	17 Me. 301	355, 356
Scattergood v. Wood	79 N. Y. 266	438
Schafer v. Reilly	50 N. Y. 61	462
Schaper v. B. & L. I. C. R. Co.	4 N. Y. S. R. 860	396
Schenck v. Andrews	57 N. Y. 132	376
Schuster v. Dutchess Co. Ins. Co.	102 N. Y. 260	526
Schuyler v. Leggett	2 Cow. 663	312
Schuyler v. Pettisser	3 Edw. Ch. 191	656
Schwander v. Birge	{ 46 Hun, 66	429, 430, 433, 439, 440, 441, 442
Scott v. Rogers	31 N. Y. 676	334
Scott v. M., U. & G. W. R. R. Co.	86 N. Y. 200	569
Secor v. Harris	18 Barb. 425	183
Selleck v. Tallman	87 N. Y. 106	615, 616
Sentell v. Oswego Co. F. Ins. Co.	16 Hun, 516	526
Seward v. Huntington	94 N. Y. 104, 114	546
Sexton v. Zetts	44 N. Y. 430	318
Seymour v. C. & N. F. R. R. Co.	25 Barb. 284	136
Shackleton v. Hart	20 How. Pr. 39	59
Shaffer v. Risley	114 N. Y. 23	235
Shaw v. B. & W. R. R. Co.	8 Gray, 45	82
Sheldon v. Hopkins	7 Wend. 435	553
Shelthar v. Gregory	2 Wend. 422	13
Shelton v. Johnson	4 Sneed, 672	184
Shepherd v. Burkhalter	13 Ga. 443; 58 Am. Dec. 260 ..	346
Shepherd v. M. Calmont Oil Co.	38 Hun, 37	251
Sheppard v. Taylor	5 Pet. 675	184
Sheriden v. Smith	2 Hill, 538	178
Shiffer v. Pruden	54 N. Y. 47, 49	554
Sickles v. Flanagan	79 N. Y. 224	170, 343
Sigourney v. Lloyd	8 Barn. & C. 622	453, 475
Silliman v. Wing	7 Hill, 159	26
Simar v. Canaday	53 N. Y. 298	364
Simonton v. Barrell	21 Wend. 362	59
Skinner v. Tinker	34 Barb. 333	616
Slocum v. Barry	38 N. Y. 46	12
Slocum v. Clark	2 Hill, 475	474
Smedis v. B. & R. B. R. R. Co.	88 N. Y. 13	231
Smith v. Buffalo St. R. R. Co.	35 Hun, 204	489
Smith v. Cross	90 N. Y. 549	53
Smith v. Gugerty	4 Barb. 625	438

TABLE OF CASES CITED.

xxiii

	PAGE.
Smith v. L. I. R. R. Co.....	102 N. Y. 190..... 631, 633
Smith v. Marrable.....	11 M. & W. 5..... 114
Smith v. Mulford.....	42 Hun, 347..... 662
Smith v. N. Y. & H. R. R. Co.....	19 N. Y. 127..... 318
Smith v. Putnam.....	61 N. H. 632..... 632
Smith v. Rockwell.....	2 Hill, 482..... 176, 177
Smith v. Schanck.....	18 Barb. 344, 346..... 52
Smyth v. Knick. L. Ins. Co.....	84 N. Y. 589..... 463
Snid v. Mayor, etc.....	17 J. & S. 126..... 405
Soldiers' Home v. Shaffer.....	63 Ill. 243..... 487
Southard v. Central R. R. Co.....	26 N. J. L. 13..... 513
Southard v. Rexford.....	6 Cow. 255..... 186
Southee v. Denny.....	1 Exch. 196..... 183
Southwick v. First Nat. Bk.....	84 N. Y. 420..... 55
Speyers v. Lambert.....	{ 1 Sweeney, 335; 6 Abb. Pr. (N. S.) 309; 37 How. Pr. 315..... 585
Starkweather v. Martin.....	28 Mich. 471..... 347
Stehlin v. Golding.....	15 N. Y. S. R. 814..... 73
Stevens v. Brennan.....	79 N. Y. 255..... 442
Stevens v. Hauser.....	39 N. Y. 302..... 288
Stilwell v. Carpenter.....	62 N. Y. 639..... 286
Stockton v. Frey.....	4 Gill, 406..... 82
Stokes v. Johnson.....	57 N. Y. 673..... 387
Stone v. Browning.....	68 N. Y. 598, 604..... 585
Stone v. Connelly.....	{ 1 Met. (Ky.) 652; 71 Am. Dec. 499..... 134
Stone v. Flower.....	47 N. Y. 566..... 301
Stone v. Lord.....	80 N. Y. 60..... 613
Storer v. McGaw.....	11 Allen, 527..... 178
Storrs v. Barker.....	16 J. Ch. 166..... 641
Story v. N. Y. El. R. R. Co.....	90 N. Y. 122, 161..... 219
Stow v. Tift.....	15 J. R. 458..... 73
Stowell v. Chamberlain.....	60 N. Y. 272..... 258
Strohm v. N. Y., L. E. & W. R. R. Co.....	96 N. Y. 305..... 87
Sullivan v. Tioga R. R. Co.....	44 Hun, 304..... 574
Sunderlin v. Ætna Ins. Co.....	18 Hun, 522..... 526
Supr's. Onondaga Co. v. Briggs.....	2 Denio, 26..... 26
Susquehanna Val. Bk. v. Loomis.....	85 N. Y. 207, 211..... 476
Sutherland v. Bradner.....	116 N. Y. 410..... 419
Sutliff v. Forgey.....	1 Cow. 89; 5 id. 713..... 364
Sutphen v. Seebass.....	14 Abb. N. C. 67..... 114
Sutton v. Temple.....	12 Mees. & Wels. 52..... 114
Suydam v. Barber.....	18 N. Y. 468..... 553
Sweet v. Tuttle.....	14 N. Y. 465, 472..... 460
Swift v. Mass. M. L. Ins. Co.....	63 N. Y. 186, 190..... 52
Switzer v. Knapps.....	10 Iowa, 72; 74 Am. Dec. 375.. 346

T.		PAGE.
Taber v. D., L. & W. R. R. Co.	71 N. Y. 489.	319
Talbott v. Bell.	5 B. Mon. 320 ; 49 Am. Dec. 126.	135
Tarbell v. West.	86 N. Y. 280.	346
Tatterson v. Suffolk Mfg. Co.	106 Mass. 56.	486
Taylor v. Harrison.	47 Texas, 454 ; 26 Am. R. 304.	346
Thayer v. Turner.	8 Met. 550.	302
Thompson v. Blanchard.	4 N. Y. 303.	641
Thorn v. Knapp.	42 N. Y. 474.	186
Tilton v. Cofield.	93 U. S. 163.	134, 138
Todd v. Union D. S. Instn.	118 N. Y. 337.	362
Toles v. Adeo.	84 N. Y. 222, 224.	194, 195
Torbett v. Eaton.	113 N. Y. 623 ; 49 Hun, 209.	376
Town v. Needham.	3 Paige, 545.	641
Town of Galen v. C. & R. P. R. Co.	27 Barb. 543.	28
Trans. Line v. Hope.	95 U. S. 297.	429, 430, 442
Troy & B. R. R. Co. v. Lee.	3 Barb. 169.	623
Trust Co. v. Nat. Bk.	101 U. S. 68.	355
Trustees Brookhaven v. Strong.	60 N. Y. 56.	639, 640
Trustees Columbia College v. Lynch.	70 N. Y. 440.	322
Trustees East Hampton v. Kirk.	68 N. Y. 459.	301
Trustees Un. College v. Wheeler.	61 N. Y. 88.	53
Tunstall v. Winton.	31 Hun, 219.	59
Tuthill v. Morris.	81 N. Y. 100.	178
Tyng v. U. S. S. & T. B. Co.	1 Hun, 161.	633
U.		
Uline v. N. Y. C. & H. R. R. R. Co.	101 N. Y. 98.	410
Upton v. Vail.	6 J. R. 181.	292
V.		
Vail v. Jersey L. F. Mfg. Co.	32 Barb. 564.	486
Van Denburgh v. Vil. of Greenbush.	66 N. Y. 1.	66
Vanderbeck v. Rochester.	46 Hun, 87.	26
Van Pelt v. McGraw.	4 N. Y. 110.	139, 149
Van Rensselaer v. Ball.	19 N. Y. 100.	479, 483
Van Rensselaer v. Dennison.	35 N. Y. 393.	483
Van Rensselaer v. Jewett.	2 N. Y. 141, 148.	480
Van Rensselaer v. Slingerland.	26 N. Y. 580, 585.	479, 481, 483
Van Rensselaer v. Snyder.	13 N. Y. 299.	479, 481, 483
Village of Delhi v. Youmans.	45 N. Y. 362.	428
Vose v. Cockcroft.	44 N. Y. 415.	236
W.		
Wager v. Troy U. R. Co.	25 N. Y. 526.	219
Wait v. Wait.	4 N. Y. 95.	553
Wakeman v. W. W. Mfg. Co.	101 N. Y. 205.	541, 542, 594
Walden v. Bodley.	9 How. U. S. 34.	135, 138
Walker v. Walker.	9 Wall, 743.	14
Wallace v. Fee.	50 N. Y. 694.	219

TABLE OF CASES CITED.

XXV

		PAGE.
Walsh v. Marine Ins. Co	32 N. Y. 427.....	430
Walsh v. Wash. Ins. Co.....	32 N. Y. 440, 443.....	458
Warner v. Lee.....	6 N. Y. 144.....	450
Warner v. N. Y. C. R. R. Co.....	52 N. Y. 437.....	389
Watchell v. N. W. & C. Ben. Soc'y.	84 N. Y. 28.....	108
Watkins v. Holman.....	16 Pet. 54.....	44
Watkins v. Maule.....	2 Jac. & Walk. 243.....	356
Webb v. B. W. & C. R. R. Co.....	49 N. Y. 420.....	229
Weidner v. Phillips.....	114 N. Y. 458.....	663
Welland Canal Co. v. Hathaway	8 Wend. 483.....	641
Wemple v. Hildrith.....	10 Daly 481.....	292
Wendell v. Van Renesselaer.....	1 J. Ch. 344, 354.....	641
Westlake v. De Graw.....	25 Wend. 669.....	113
Weston v. N. Y. E. R. R. Co.....	73 N. Y. 595.....	318
Westover v. Ætna L. Ins. Co.....	99 N. Y. 56.....	85
Wheelock v. Tanner.....	39 N. Y. 481.....	176
Whipple v. Christian.....	80 N. Y. 525.....	66
Whistler v. Forster	14 C. B. (N. S.) 246.....	855, 356
White v. Cont. Nat. B'k.....	64 N. Y. 316, 320.....	476
White v. Dobson.....	17 Grat. 262.....	617
White v. Miller	71 N. Y. 118, 133.....	266, 541
White v. Nat. B'k.....	102 U. S. 658.....	458, 475
White v. Smith	54 N. Y. 522.....	603
Whitney v. Allaire.....	1 N. Y. 305.....	301
Whitney v. B. R. Ins. Co.....	72 N. Y. 118.....	173
Whitworth v. Erie R. Co.....	87 N. Y. 413.....	123
Wilcox v. Wilcox.....	46 Hun, 32, 38.....	88
Wilkinson v. First Nat. F. Ins. Co..	72 N. Y. 499, 502.....	243
Williams v. Byrne.....	7 Ad. & Enl. 177.....	488
Williams v. Sheldon.....	10 Wend. 654.....	347
Williams v. Wood.....	14 Wend. 127.....	286
Wilson v. Hatton	L. R. (2 Exch. Div.) 336.....	114
Winchell v. Hicks.....	18 N. Y. 558.....	300
Wiseman v. Lucksinger.....	84 N. Y. 31.....	250
Wisner v. Ocumpaugh.....	71 N. Y. 113.....	137
Witty v. Matthews.....	52 N. Y. 512.....	113
Wood v. Chapin.....	13 N. Y. 509.....	546, 547
Wood v. Fleet.....	36 N. Y. 499.....	249
Wood v. Hitchcock.....	20 Wend. 47.....	176
Woodward v. Republic F. Ins. Co..	32 Hun, 365.....	526
Woolner v. Hill.....	93 N. Y. 576.....	616
Woolsey v. Judd.....	4 Duer, 379.....	35
Worrall v. Munn.....	5 N. Y. 229.....	613
Wright v. Miller.....	1 Sand. Ch. 103.....	17

Y.

Yates v. Joyce.....	11 J. R. 136.....	139, 149
Yovatt v. Winyard.....	1 Jac. & Walk. 394.....	36



CASES DECIDED
IN THE
COURT OF APPEALS
OF THE
STATE OF NEW YORK,
(SECOND DIVISION.)
COMMENCING DECEMBER 10, 1889.

HENRY P. DEGRAAF, Respondent, v. JACOB F. WYCKOFF,
Appellant.

Plaintiff indorsed certain promissory notes for the accommodation of the maker, which were discounted by defendant, certain railroad bonds being pledged as collateral. Before the maturity of the notes, plaintiff consented that other first mortgage railroad bonds might be substituted for those pledged. The notes were transferred by defendant, and were taken up by him upon the promise of plaintiff to give his own notes therefor; he having failed so to do, defendant brought suit upon the promise. Plaintiff set up as a defense therein a misappropriation of the bonds pledged, based upon the fact that defendant accepted in lieu thereof second instead of first mortgage bonds as agreed. This defense was ruled out on the objection of defendant, and he recovered judgment. In this action, brought to recover damages for the misappropriation, *held*, that the former judgment was not a bar, as the cause of action here was unavailable as a defense in the former action, and was not pleaded or presented as a counter-claim.

(Argued October 18, 1889; decided December 10, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made November 11, 1886, which modified and affirmed, as modified, a judgment in favor of plaintiff, entered upon a decision of the court on trial at Special Term.

This action was brought to recover damages for the alleged misappropriation of certain railroad bonds pledged to defend-

Statement of case.

ant as security for certain promissory notes indorsed by plaintiff.

Defendant discounted the said notes, which amounted to \$20,000. They were made by one Scofield and indorsed by plaintiff for Scofield's accommodation. The notes were secured by \$20,000 (par value) railroad bonds, first lien on the Utah and Pleasant Valley Railroad, pledged as collateral. Before these notes matured, to wit, December 30, 1879, at the request of Scofield, plaintiff consented, in writing, that defendant might surrender the bonds on receipt in their place of forty \$500 first mortgage bonds of the Wasatch and Jordon Valley Railway Company. These notes were renewed and others given in their stead at the request of plaintiff. Defendant was induced to take up this second series of notes at the request and upon the promise of plaintiff that he would give his own notes to defendant at four months. Plaintiff did not do so and for such failure was sued by the defendant in the Court of Common Pleas of the city of New York and a recovery had for \$22,100.26, which judgment was reversed by the General Term of the Common Pleas, but affirmed in the Court of Appeals. (98 N. Y. 134.)

The alleged misappropriation of the bonds, constituting this cause of action, was set up as a defense in said action but the defense was excluded upon objections by defendant.

After judgment was recovered, as aforesaid, this action for the misappropriation of the bonds was brought and plaintiff incidently asked special relief restraining the execution of the Wyckoff judgment on account of Wyckoff's insolvency and non-residence, etc. It appeared that the defendant surrendered the U. & P. V. bonds and accepted in lieu thereof W. & J. V. bonds, nominally first mortgage bonds, but which were not so in fact; that there was a series of first mortgage bonds issued by the W. & J. V. R. R. Co.; that a new company, with the same name, was subsequently formed by the consolidation of the original company with another railroad company; that the new company issued the bonds of which those so substituted were a part, secured by mortgage upon the consolidated road. Plain-

Statement of case.

tiff recovered a judgment herein for damages for misappropriation, based upon the value of the U. & P. V. bonds on December 30, 1879, and by that valuation the judgment in defendant's action against the plaintiff was paid and all proceedings thereon to collect the same were stayed, etc. On appeal to the General Term that court reversed said judgment unless the plaintiff should consent to a modification and reduction thereof, to the value of the forty \$500 first mortgage bonds of the W. & J. V. R. R. Co. on the 30th of December, 1879, with interest, the difference being \$7,014.23.

The plaintiff gave the stipulation and the judgment was so modified.

Further facts appear in the opinion.

Cephas Brainerd for appellant. The claim of the plaintiff in this action was involved directly in the Common Pleas action and was disposed of by that judgment. (*Edwards v. Stewart*, 15 Barb. 67, 69; *Hopkins v. Lee*, 6 Wheat. 109; *Jordan v. Van Epps*, 85 N. Y. 427, 436; *Patrick v. Shaffer*, 94 id. 423, 430; *C. P. Co. v. Walker*, 114 id. 7.) The letter of DeGraaf is to be construed most strongly against him. (*Beiney v. Newcourt*, 9 Cush. 46, 56; *Grantz v. Columbia*, 18 Ct. of Claims Rep. 569, 577; *Noonan v. Bradley*, 9 Wall. 394, 407; *Wetmore v. Pattison*, 45 Mich. 439, 441; Phil. on Ev., chap. 8, § 13; *Stephens on Evidence*, 16, Rule 8; *S. L. Home v. Ass'n.*, 52 N. Y. 191; *Eighmie v. Taylor*, 89 id. 288.) There is no ground shown for the interposition of a court of equity, no proof of mistake. (High on Injunctions, §§ 113, 114, 115, 165; *Henderson v. Hinckley*, 17 How. Pr. 443, 445, 446.) On this appeal it is competent for this court to reverse the judgment and order a judgment in favor of the defendant. (*Guernsey v. Miller*, 80 N. Y. 181; *Fox v. Kidd*, 77 id. 489; *Thomas v. Ins. Co.*, 8 Civil Pro. R. 4.)

Esek Cowen for respondent. The judgment, in the case of *Wyckoff v. DeGraaf*, put in evidence by the defendant, was not a prior adjudication, as to any point involved in this case.

Opinion of the Court, per POTTER, J.

(*Bates v. Rosekrans*, 37 N. Y. 409; *Crane v. Hardman*, 4 E. D. Smith, 451.) Mr. De Graaf was not compelled to insist on proving the facts set up in his answer as a counter-claim. He had the right to bring a separate action. (*Brown v. Gallandet*, 80 N. Y. 413.) There was no error committed by the trial court, in the reception or exclusion of evidence, which could have affected the result. (*Atkinson v. R. P. Co.*, 43 Hun, 167; *Thayer v. Mauly*, 73 N. Y. 305; *Duel v. Getmann*, 6 N. Y. S. R. 397; *Yates v. Hoffman*, 5 Hun, 113; *Cooper v. Bigelow*, 1 Cow. 206; *Chamberlain v. Day*, 3 id. 353; *U. Ins. Co. v. Powers*, 3 Paige, 365; *Nicoll v. Nicoll*, 16 Wend. 446.)

POTTER, J. The theory of this action is that defendant, who held security for the payment of obligations on which plaintiff was liable as surety, surrendered those securities and took less valuable securities instead, without the consent of the plaintiff, whereby plaintiff was compelled to pay said obligations without the benefit of the surrendered security to re-imburse himself for such payment and thus was damnified. These allegations are denied by the defendant who, moreover, sets up as a bar to this action, that in an action brought by him in the Court of Common Pleas in the city of New York, to recover of plaintiff upon such obligations, the plaintiff in this action interposed such surrender of security as a bar and that the plaintiff is therefore estopped in this action by the judgment in that action as such matter was or might have been determined therein. The findings of the trial court as to which bonds were to be substituted for the Utah and Pleasant Valley bonds and as to other essential allegations of the complaint are conclusive upon this court and must stand unless there was practically no evidence to support the finding or the court committed an error in receiving or rejecting evidence which bore upon that question.

The gist of this action is the unauthorized substitution of Wasatch and Jordon Valley bonds for Utah and Pleasant Valley bonds. The evidence of the receipt of the Utah and Pleasant Valley Railroad bonds by Wyckoff as security for the \$20,000

Opinion of the Court, per POTTER, J.

loan to Scofield (represented by the notes) and the consent of DeGraaf to the substitution of the first mortgage bonds of the Wasatch and Jordon Valley Railroad was in writing and was to my apprehension so free from any ambiguity of meaning or liability to misapprehension in respect to the kind of bonds to be substituted, as to exclude any parol or explanatory evidence. The consent was for *first* mortgage bonds, not in *name* but in *fact*. The bonds received by Wyckoff as substitute were in fact second lien bonds and so not covered by DeGraaf's written consent.

There were other exceptions upon the part of defendant, many of which are effectually answered in the opinion of Justice Daniels at General Term, and therefore require no further attention; such as the evidence of the value of the various issues of bonds of these railroads.

The refusal of the court to allow proof by Scofield whether the surrendered bonds went into the sale made to the syndicate or to the witness and whether the plaintiff received the proceeds of these bonds after being sold to the syndicate or to Scofield would be matters of inference by the witness and if answered in the affirmative would be immaterial unless it was shown that plaintiff parted with no other consideration to get the proceeds of them. To have made this evidence pertinent or proper, the defendant should have proved or have offered to prove that the plaintiff got the proceeds in his original right thereto and without parting with any new or other consideration therefor.

The exceptions to the evidence in relation to Wyckoff's insolvency was not upon the main issue in relation to plaintiff's right to recover damages for the misappropriation of the bonds but upon the collateral or incidental remedy employed to stay the judgment obtained by Wyckoff, against the plaintiff until the plaintiff should have opportunity and the right to apply the damages he might recover in this action upon or towards the payment or liquidation of that judgment. It could not affect the main issue between these parties and could have worked no harm to the defendant in the substantial contention.

Opinion of the Court, per POTTER, J.

All the plaintiff needed to prove in this respect was that defendant was insolvent and that was sufficiently proven by the introduction of the judgment against Wyckoff and the return of an execution unsatisfied. It certainly cannot be necessary or wise to grant a new trial of the merits of this case for such reason.

The remaining matter for consideration relates to the defense set up by plaintiff to Wyckoff's action, that the latter had misappropriated the Utah and Pleasant Valley Railroad bonds and the disposition made of that defense.

The defendant sought to bar the plaintiff from a recovery in this action for the reason that the claim in this action was substantially the plaintiff's defense in that action, upon the well established principle that that matter was, or might have been, litigated in that action. The answer to that contention is that such matter was put forward as a defence and not as a counter-claim. As a defense to that action (which was for a breach of contract) this matter (which was for misappropriating of securities) would be totally unavailable, and when the plaintiff, Wyckoff, objected to it, it was ruled out as a defense and such ruling must have been approved by this court in affirming the judgment Wyckoff obtained upon that trial. The matter was not in fact and could not, as matter of law, have been presented as a counter-claim; for it was pleaded in form simply as a defense and was not even offered upon the trial as a counter-claim. (*Bates v Rosekrans*, 37 N. Y. 409.)

Hence the record in the Wyckoff action against the plaintiff, could not create an estoppel to that matter, forming the subject of this action.

We think there is no other course open to us leading to a different result.

The judgment should be affirmed with costs.

All concur except FOLLETT, Ch. J., not voting, and HAIGHT, J. not sitting.

Judgment affirmed.

Statement of case.

BAINBRIDGE S. CLARK, as Trustee, etc., Respondent, v.
C. BALDWIN FOSDICK, et al., Appellants.

118	7
122	570

A husband and wife agreed to live separately, and to effectuate that agree-
ment entered into articles of separation, through the medium of a trustee,
by the terms of which the husband agreed to pay to the trustee, annually
a sum named, for the support of the wife during life, the same to be in
full satisfaction for such support and maintenance and of all alimony;
the wife and trustee covenanted to save the husband harmless from
his obligation to support her, and upon execution of the agreement the
parties separated. In an action against the husband, to recover a pay-
ment under the agreement, *held*, that it was valid; that the trustee
named was the trustee of an express trust, and that the action was
properly brought in his name; also, *held* (FOLLETT, Ch. J., dissenting),
that the agreement was not abrogated by a subsequent divorce of the
parties, at least when no provision for alimony was made in the decree of
divorce.

(Argued October 25, 1889; decided December 10, 1889.)

APPEAL from judgment of the General Term of the Court
of Common Pleas of the city of New York, entered upon an
order made January 13, 1887, which affirmed a judgment of
the City Court of New York, in favor of plaintiff entered
upon an order of Special Term overruling a demurrer to
plaintiff's complaint.

This was an action to recover an installment due under
articles of separation between defendant, C. Baldwin Fosdick,
and Jennie P. Fosdick.

Jennie P. Fosdick intermarried with the defendant, C. Bald-
win Fosdick, on the 11th day of April, 1878, and thereafter
they lived together as husband and wife until the 14th of
February, 1883. Differences having arisen it was agreed
between them that they should live separately and to effectu-
ate that agreement, articles of separation were entered into
between the parties and the plaintiff, who, as trustee, was party
of the third part bearing date the 14th of February, 1883,
which recited that such differences had arisen and that for
that reason they agreed to live separately. Immediately upon

Statement of case.

the execution of said agreement they separated in fact and continued to live separately thereafter. By the articles of separation C. Baldwin Fosdick, the husband, and Charles B., the husband's father, covenanted that they would pay to the plaintiff as trustee for the support and maintenance of Jennie P. Fosdick, the wife, and her two children, twenty-five hundred dollars per annum, payable quarterly, during the period of her natural life, unless she should remarry, in which case the allowance was to cease, and that in case of the death of both of the children the allowance should be reduced to two thousand dollars. The sum paid was in full satisfaction for such support and maintenance and of all alimony whatsoever.

The agreement contained the further provision that the trustee should indemnify the husband against the support of his wife and the children; that he would pay the allowance over to her for her support and that of the children. The articles further provided that the husband should not interfere with his wife and that she should have the custody, management and control and education of the children, but that the husband and Charles P. Fosdick, his father, and the latter's wife were to have access to the children at all reasonable times and places.

After the execution of the agreement and the separation of the parties, in pursuance of the provisions in the same and the payment of the allowance for some time, the wife went to reside in the state of Rhode Island, and after residing there for the period of one year, commenced an action for divorce against her husband. He appeared in the action and litigated the same. The decree therein adjudged as follows: "That the prayer of the said petitioner be granted; that the bonds of matrimony existing between the said Jennie P. Fosdick and said C. Baldwin Fosdick be and the same are hereby dissolved and the said Jennie P. Fosdick have the exclusive custody of the two children, Clark Fosdick and Pauline Fosdick, until the further order of the Court."

This decree or so much of it as above recited, together with the agreement thereto annexed formed part of the complaint herein.

Statement of case.

The defendant demurred to the complaint assigning as grounds of demurrer:

First. That the plaintiff has not the legal capacity to sue, for that the trust has ceased and the plaintiff has no longer any interest, the only party in interest at the time of the commencement of the action being Jennie P. Fosdick.

Second. That said complaint does not state facts sufficient to constitute a cause of action.

Third. That there is a defect of parties plaintiffs, in that Jennie P. Fosdick is not named therein as a party plaintiff therein.

H. M. Whitehead for appellant. The agreement sued upon is in violation of section 10, article I of the Constitution of the State of New York, which provides that no "divorce shall be granted otherwise than by due judicial proceedings." (11 Ves. Ch. 526; 3 Johns. Ch. 54; 1 Edw. Ch. 480; 1 Hoff. Ch. 1.) The agreement sued upon is void on the ground of public policy, which forbids that parties should be permitted to make agreements for themselves to live separate. (5 Bligh. N. S. 331, 367, 375; 2 Dowl. Par. Cas. 332; 1 Carr. & P. 36; 2 Carr. & M. 338; 2 East. 283; 11 Ves. Ch. 526; 3 Johns. Ch. 521; 1 Edw. Ch. 480; 1 Hoff. Ch. 1; 8 N. H. 350; 2 Sim. & S. Ch. 362; 1 Younge & C. Ch. 28; *Rogers v. Rogers*, 4 Paige, 517; *Cropsey v. McKinney*, 30 Barb., 47; *Morgan v. Potter*, 17 Hun, 403; *Beach v. Beach*, 2 Hill, 260; 22 Barb. 103; *Cropsey v. McKinney*, 30 id. 56; *Griffin v. Banks*, 37 N. Y. 623.) The agreement sued upon is invalid upon its face, being an agreement to separate, while the parties were living together in matrimony, and not showing any grounds for which a bill of separation would lie. (*Rogers v. Rogers*, 4 Paige, 513; *Friedman v. Brennan*, 43 Hun, 390; *Crawford v. Morrell*, 8 Johns. 253; *Thayer v. Rock*, 13 Wend. 53; *Baldwin v. Palmer*, 10 N. Y. 232; *DeBeerske v. Paige*, 36 id. 536; *Saratoga Co. Bk. v. King*, 44 id. 87; *Dow v. Way*, 64 Barb. 255; *Hyer v. Burger*, 1 Hoff. Ch. 1.) If the agreement set forth in the complaint be valid upon its face it is not properly

Statement of case.

declared upon. (*Dupre v. Rim*, 7 Abb. [N. C.] 256; *Ryce v. Ryce*, 62 Ind. 64; *Campbell v. Campbell*, 37 Wis. 203; *Swift v. Beers*, 3 Den. 70.) The decree of divorce estops the plaintiff from maintaining this action. (*Kamp v. Kamp*, 59 N. Y. 212; *Crimmins v. Crimmins*, 28 Hun, 200; *McQuien v. McQuien*, 61 How. Pr. 218; 63 id. 194; *S. C. A. L. H. v. Smith*, 17 Atl. 770; *Squires v. Squires*, 53 Vt. 208; *Skilher v. Gregory*, 2 Wend. 422; *Wright v. Miller*, 1 Sandf. Ch. 102; *Charruand v. Charruand*, 1 Leg. Obs. 134; *Kamp v. Kamp*, 59 N. Y. 213; 37 id. 623; *Wills v. Stout*, 9 Cal. 479, 498; *Belveley v. Belveley*, 93 Ind. 255; *Meckenberg v. Holler*, 29 id. 139; *Fischli v. Fischli*, 1 Blackf. 360; 12 Am. Dec. 257; *Williams v. Williams*, 13 Ind. 523; *Sullivan v. Learned*, 49 id. 252; *Moon v. Baum*, 58 id. 194; *Culame v. Culame*, 24 N. J. Eq. 440; *Gleason v. Emerson*, 51 N. H. 405; *Hunt v. Thompson*, 61 Mo. 148; *Calvo v. Davies*, 73 N. Y. 211; Koenig's Appeal, 56 Pa. 352; *Dodson v. Ball*, 60 id. 493; Wood's Appeal, 9 Cent. R. 376; *Johnson v. Johnson*, 65 How. Pr. 517; *Carpenter v. Osborne*, 102 N. Y. 552.) The agreement, considered in connection with the other facts set forth in the complaint, is fraudulent. (*Earl of Bristol v. Wilsmore*, 1 B. & C. 514; *Ash v. Putnam*, 1 Hill, 302; *Ferguson v. Carrington*, 9 B. & C. 59; *Fosdick v. Fosdick*, 1 N. E. Rep. 38.) Assuming the validity of the agreement of separation upon its face, yet if it was executed in pursuance of an agreement for absolute divorce to be had thereafter, it is collusive and void as against public policy. (*Moon v. Baum*, 58 Ind. 194; *Johnson v. Johnson*, 65 How. Pr. 517; Bishop on Mar. & Div. §§ 301, 595; *Daggett v. Daggett*, 5 Paige, 509.) Assuming that the agreement of separation is valid; that the parties may beforehand make a valid agreement for support or alimony to be paid after divorce, that is not the fair purport and meaning of the agreement sued upon, and was not the intention of the parties as evidenced by their situation and the circumstances surrounding them and the laws under which they were living. (*Burr v. Burr*, 7 Hill, 213.) There is a defect of parties plaintiff. (Code, § 449; *Dupre v. Rim*, 7 Abb. [N. C.] 256.)

Statement of case.

Horace Russell and *Jabish Holmes, Jr.*, for respondent. The plaintiff has legal capacity to sue, and Mrs. Fosdick is not a necessary party. (Code Civ. Proc. § 449; *Dupre v. Rim*, 7 Abb. [N. C.] 256; Code, § 449; *Greenfield v. Mass. Ins. Co.* 47 N. Y. 430; *Slocum v. Barry*, 38 id. 46; 34 How. Pr. 320; *Cummins v. Barkalow*, 4 Keyes, 514; *Considerant v. Brisbane*, 22 N. Y. 389; Code Civ. Pro. § 449; *Greenfield v. M. Ins. Co.* 47 N. Y. 430; *Hughes v. M. Ins. Co.* 44 How. Pr. 351.) The complaint states facts sufficient to constitute a cause of action. (*Carson v. Murray*, 3 Paige, 483; *Rogers v. Rogers*, 4 id. 516; *Allen v. Affleck*, 64 How. Pr. 380; *Dupree v. Rim*, 7 Abb. [N. C.] 256; *Carpenter v. Osborn*, 102 N. Y. 552; *Pettit v. Pettit*, 107 id. 677; Abb's. Clk's Con. Asst. 465, form 929, Dunlap's Book of Forms, 132; Curtis' Conveyancer, 235, 288; Jenkins' New Clerk Asst., 332; McCall's Clerk Asst. 294; Jones' Forms in Conveyancing, 707; 2 Humprey's Practical Forms, 1288.) The divorce has not effected defendant's liability upon the articles. (Stewart on Mar. & Div., § 191; *Grant v. Budd*, 30 L. T. Rep. 319; *Charlesworth v. Holt*, 43 L. J. [N. S.] 681; *Goslin v. Clark*, 12 C. B. [N. S.], 681; *Jee v. Thurlow*, 2 B. & C. 547; *Kremelberg v. Kremelberg*, 52 Md. 553; *Blaker v. Cooper*, 7 S. & R. 500; 7 *McGrath v. Ins. Co.*, 8 Phila. 113; *Wright v. Miller*, 1 Sandf. Ch. 126; *Carpenter v. Osborn*, 102 N. Y. 552, 559; *Pettit v. Pettit*, 107 id. 667; 2 Bishop on Mar. & Div., § 375; *Rose v. Rose*, 11 Paige, 166; *Collins v. Collins*, 80 N. Y. 1; *Wallace v. Bassett*, 41 Barb. 97.) The surety, Charles B. Fosdick, cannot raise the question that the complaint does not state a cause of action against him. (*Fish v. Hose*, 59 How. Pr. 238; *Eldridge v. Bell*, 12 id. 547; *Philips v. Hagadon*, 12 id. 17; Code Civ. Pro., § 454; *Carman v. Plass*, 23 N. Y. 286; *Decker v. Gaylord*, 8 Hun, 110; *Allen v. Rightmere*, 20 Johns. 365; *Douglass v. Howland*, 24 Wend. 35; *Brown v. Curtis*, 2 N. Y. 225; *H. M. Co. v. Farrington*, 81 N. Y. 121.) The judgment should be affirmed without leave to defendants to answer. (*Snow v. F. N. Bank*, 7 Robt. 479; *Lowry v. Inman*, 6 Abb. Pr. [N. S.], 404.)

Opinion of the Court, per POTTER, J.

POTTER, J. The questions to be decided upon this appeal are presented by demurrer to the complaint. The complaint alleges the facts which ordinarily give an action to recover the money promised to be paid the plaintiff as trustee, under the agreement, but it also alleges a decree of divorcement obtained by the wife after the making of the agreement of separation and which the defendant contends, defeats the plaintiff's action. The purpose of thus pleading was to obtain a final judgment upon the rights of these parties in a more speedy and less expensive way.

It will be more orderly to consider first the ground of demurrer strictly applicable to the right of the plaintiff as trustee to bring the action.

By the express terms of the agreement of separation the defendant, C. Baldwin Fosdick, agrees to pay to the plaintiff for and towards the support and maintenance of his wife, the said Jennie P. Fosdick and their children, the yearly sum of twenty-five hundred dollars for and during the period of her natural life unless she remarries, etc., and the plaintiff and said Jennie agree that said sum so paid shall be in full satisfaction of the support and maintenance of said Jennie P. Fosdick and children and all alimony whatsoever.

This clearly constitutes the plaintiff the trustee of an express trust and required that an action to enforce or to execute the trust should be brought in his name. (Code of Civ. Pro., § 449; *Calkins v. Long*, 22 Barb. 97; *Greenfield v. Mass. M. L. Ins Co.*, 47 N. Y. 430; *Slocum v. Barry*, 38 N. Y. 46; *Hughes v. Mercantile Mut. Ins. Co.*, 44 How. Pr. 351.)

The next question to be considered is the validity of the agreement itself. I think it is to be assumed in the consideration of this appeal that at the time of executing the instrument, which forms the basis of this action, the defendant C. Baldwin Fosdick and Jennie P. Fosdick were husband and wife and were living together as such.

The first inquiry should be to learn whether the courts of this state have decisively passed upon that question, and, if so, of course, we are to follow such holding. It was reluctantly

Opinion of the Court, per POTTER, J.

held by the chancellor in *Carson v. Murray* (3 Paige, 500), and then only upon the principle of *stare decisis* as evinced by *Baker v. Barney* (8 John. 72); *Shelthar v. Gregory* (2 Wend. 422), following the English decisions prior to the revolution that "a valid agreement for an *immediate* separation between husband and wife and for a separate allowance for her support, may be made through the medium of a trustee."

The case of *Carson v. Murray* (3 Paige, 483), was upon a bill in equity by the wife against the executors of her husband, based upon an agreement of separation, for its enforcement, out of the estate of the deceased husband. The case of *Baker v. Barney* (8 John. 72) was an action to recover of the husband the price of suitable goods sold to the wife after the separation of husband and wife under an agreement making provision for the support of the wife.

The case of *Shelthar v. Gregory* (2 Wend. 432) was an action upon the bond and agreement to separate; the defense was that after the bond was given and before the installment or sum fell due by the terms of the agreement, the wife returned to, and was living with the husband and was supported by him. In these cases, the husband and wife were living together when the agreement or articles of separation were executed and separated immediately thereafter. The ruling of the court was to the effect that such articles of separation *considered* under these various aspects were valid. These holdings were based upon decisions made in the English courts and I am not aware that the English or our own courts have departed or receded from the principle thus laid down. While husband and wife in *Calkins v. Long*, (22 Barb. 98) had actually separated before the agreement of separation was executed, the court in holding that the agreement was valid, cites numerous decisions with approval in England and several of the states of the Union to the effect that such agreements are valid and will be enforced where the separation had taken place before, or takes place immediately after, the execution of the agreement of separation and this

Opinion of the Court, per POTTER, J.

case is said (in a note upon page 110) to have been affirmed by the Court of Appeals.

Judge DAVIS in delivering the opinion of the court in *Walker v. Walker* (9 Wall. 743), while regretting, upon the score of public policy, that the courts of England and of this country had gone so far, was, as was the chancellor in *Calkins v. Long*, *supra*, constrained to hold that "a covenant by the husband for the maintenance of the wife contained in a deed of separation between them through the *medium* of trustees, and where the consideration is apparent, is valid and will be enforced in equity, if it appears that the deed was not made in contemplation of a future *possible* separation, but is made in respect to one which was to occur immediately, or for the continuance of one which had already taken place.

The validity of such agreements are recognized and enforced in numerous cases decided by the courts of this and other states. (*Carpenter v. Osborn*, 102 N. Y. 552; *Pettit v. Pettit*, 107 N. Y. 677; *Carson v. Murray*, 3 Paige, 483; *Rogers v. Rogers*, 4 Paige, 516; *Allen v. Affleck*, 64 How. Pr. 380; *Dupre v. Rein*, 7 Abb. [N. C.] 256.)

We come now to consider the question whether the divorce granted upon the application of the wife, affected the agreement of separation. Ordinarily that question would be presented by an answer to the complaint by way of defense. That matter is now presented upon behalf of the plaintiff and as a part of the complaint and the defendant demurs to it. Of course, the defendant admits the truth of the allegations of the complaint and just as stated in the complaint. The defendant is confined to that statement and is not at liberty to resort to any doubtful inferences of fact arising from the circumstances or motives to the making of the agreement or to any doubtful intendments from the language or construction of the agreement or the decree of divorce, unfavorable to the plaintiff.

The complaint after setting forth the agreement of separation dated February 14, 1883, alleges that on the 23d day of

Opinion of the Court, per POTTER, J.

September, 1885, the said Jennie Fosdick obtained a decree of absolute divorce from a court of the State of Rhode Island, having power to grant the same and having jurisdiction of the parties; of the plaintiff, by reason of a *bona fide* residence in that state for a year and of the defendant, by reason of his appearance in that court and the interposition of his defense to the action.

The decree or a portion of it, is set forth in the complaint in this action from which it appears "that the bonds of matrimony now existing between the said Jennie P. Fosdick and the said C. Baldwin Fosdick be and the same are hereby dissolved and that the said Jennie shall have the exclusive custody of her two children, Clark Fosdick and Pauldine Fosdick, until the further order of the court."

The complaint alleges that no alimony was asked or granted in said action and that the wife relied upon the covenant contained in the agreement of separation in that regard.

It is contended upon behalf of the defendant that this decree estops the plaintiff from maintaining this action. There is nothing in the complaint in this action or in the decree showing the ground upon which such divorce was granted; nor when the ground on which it was granted began, or ceased, to exist. And as the estoppel must depend upon the matters set forth in the complaint and the decree, the estoppel cannot prevail unless such decree, upon whatsoever grounds it may have been granted, as matter of law, nullifies the agreement of separation. I say as matter of law, for the reason that there is nothing in express terms that conditions the payment of the money upon her not applying for or obtaining a divorce from her husband. The question is therefore whether such decree rendered the article of agreement of separation or its provision for the payment of the money in suit, of no further effect. It may be here remarked that the agreement in question is to be considered and adjudicated in view of its provisions and the rules applicable to agreements generally. It is to be assumed in the construc-

Opinion of the Court, per POTTER, J.

tion of this agreement, that it contains all that the parties intended to agree to and that their minds met upon.

By the terms of the agreement under consideration, the defendant agrees to pay to the plaintiff for and towards the support and maintenance of his wife, Jennie Fosdick and their children the yearly sum of twenty-five hundred dollars for and during the period of her *natural life unless* she remarries, and that in case of the death of the two children, the amount to be paid shall be reduced to two thousand dollars, and that in case of the death of either said husband or wife, the agreement was to be at an end and have no further force or effect.

Thus it will be seen that an application for, or the obtaining of, a divorce by the wife was not by the agreement made a condition of the payment of the money or in any manner to affect the defendant's obligation to pay it.

It seems to me very clear both upon principle and authority that the defendant's contention is untenable and that the divorce granted to the wife, Jennie P. Fosdick, is not a bar to this action to recover the money stipulated in the agreement.

As we have seen the law sanctions agreements in certain circumstances between husbands and wives for separate living and providing the means for the support and maintenance of the wife and children through the medium of a trustee to receive and disburse the same. Such agreements take the place as far as they extend of the duties and obligations of the law in relation to husband and wife and their children. But they do not supercede or render inoperative other duties and obligations imposed by law upon husband and wife toward each other and toward their children. They are still husband and wife, but living apart from each other and bound to observe all the other martial duties resting upon them as husband and wife and parents, not provided for in the agreement of separation. Neither of them can marry nor commit adultery without incurring the consequences and the penalty prescribed by law to husbands and wives who commit those offences. Hence we find numerous decisions of the courts in nearly all civilized

Opinion of the Court, per POTTER, J.

countries, holding that either husband or wife may, notwithstanding the existence of such agreement between them, maintain against the other the ordinary action for divorce, limited or absolute, according to the ground and the jurisdiction, and whether the ground therefor accrued before or after such agreement was entered into. The following authorities I think sustain the proposition. (Stewart on Mar. & Div., § 191; *Grant v. Budd*, 30 L. T. Rep. 319; *Charlesworth v. Holt*, 43 L. J. [N. S.] part 2, Exch. 25; *Wright v. Miller*, 1 Sand. Ch. 103; *Carpenter v. Osborn*, 102 N. Y. 559; *Pettit v. Pettit*, 107 id. 667; *Jee v. Thurlow*, 2 Barn. & Cress. 547; *Kremelberg v. Kremelberg*, 52 Ind. 553.)

With these views and authorities it seems very clear to me, that the agreement of separation is valid and has not been in anywise rendered ineffectual by the decree of absolute divorce granted to the wife.

This case is free from the question often involved in this class of cases arising from the allowance of a greater or less amount in the decree of divorce than the amount provided in the article of separation. The decree of divorce made no provision for alimony. Nor did the decree change the provision in the article of separation in relation to the custody and control of the children, as I do not apprehend that the omission of the privilege of visiting the children by the father and grandfather from the decree, changes at all that right as provided in the agreement.

The agreement remains unaffected in that and other respects, capable of enforcement by any of the parties to it by all proper means.

Judgment absolute should be granted with costs in favor of the respondent.

Opinion, per FOLLETT, Ch. J., dissenting.

FOLLETT, Ch. J. (dissenting). I cannot assent to either of these judgments. * The husband was by law, bound to support his wife so long as the marital relation existed. As a substitute for that obligation, the husband contracted to pay fixed sums at stated times in the future, in consideration of which, the wife and her next friend contracted to relieve the husband from his obligation. The contract arose out of the rights and liabilities of the marital relation, was wholly executory, and rested on the presumption that the relation and those rights and liabilities would continue. The judgment dissolving the relation cut down the consideration upon which the executory stipulations rested, and destroyed the contract. The defendant was no longer under any obligation to support the plaintiff as his wife, for she was not his wife. The stipulation of the woman and of her next friend, that they would save the man harmless from his obligation to support her was without further foundation or consideration. Under the statutes, the court, upon the dissolution of the marriage, was free to fix the amount which the man should thereafter pay for the future support of the woman. It is said, the parties have contracted and have not limited the duration of the contract to the period during which the relation of husband and wife should exist. This relation is initiated by contract, but when established, it ceases to exist solely by virtue of the contract and becomes a status in which, and in the obligations arising out of it, the state has an interest, and public policy forbids that its obligations shall be made the subject of bargain and sale, like rights in property as may suit the caprice of the parties. The consequences which may flow from judgments affecting an institution which is the recognized foundation of civilization, should be regarded. Suppose that a husband and wife who have separated, afterwards contract to live apart, the husband agreeing to pay stipulated sums at fixed times for the support of his wife, and the wife and her next

* The other judgment referred to is that in the case of *Galusha v. Galusha*, (116 N. Y. 635). This dissenting opinion was not handed down until after that volume was completed.

Statement of case.

friend contract to save the husband harmless from his obligation to support her. Subsequently, the wife lives in open adultery, it may be with the next friend, for which misconduct the husband obtained an absolute divorce. Under the doctrine of these judgments, it seems to me that the husband, notwithstanding the divorce, would be compelled to continue the payment for the support of the woman and her paramour. But it is said that such consequences may be prevented by the insertion of appropriate stipulations in future contracts, but I think consequences so pregnant with evil to the marital relation ought not to be left to the chance of contract. It must be remembered that we are not dealing with executed contracts by which property has been conveyed in consideration of the relation, nor with contracts between husband and wife resting upon their rights of property.

All concur with POTTER, J., except FOLLETT, Ch. J., dissenting, and HAIGHT, J., not sitting.

Judgment affirmed.

JOHN FLYNN, et al., as Commissioners of Highways, etc., v.
ALBERT J. HURD, as Commissioner of Highways, etc.,
Appellant.

118	19
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In an action brought by the commissioner of highways of the town of H. against the commissioners of highways of the towns of W. C. and C. to recover back moneys, alleged to have been paid by plaintiff in repairing a bridge between said towns, in excess of the proportion of plaintiff's town; it appeared that the stream crossed by the bridge divided the town of H. from the towns of W. C. and C., and that the commissioners of the three towns worked together in making the repairs; it was understood that plaintiff was to pay one-half of the expense and the commissioners of the other two towns each one-fourth; after the repairs were completed, the three commissioners accounted with each other and a final adjustment of accounts was had on the basis above stated; they respectively submitted their accounts for audit and upon their being audited, each commissioner was reimbursed by taxes collected from his town. *Held*, that conceding each town should have paid one-third of the expense, the error on the part of plaintiff was one of law and not of fact and the overpayment made by him could not be recovered back; that when plaintiff

Statement of case.

exceeded the proportion of the expense with which he was authorized to burden his town his act was individual and not official and the rule as to voluntary payments applied; that the town could not by subsequently reimbursing him alter or affect the legal status of the parties as it existed prior to such reimbursement.

Also *held*, that the action was not maintainable because the requirements of the statute establishing the precedent condition upon which the liability of a town for the repair of a bridge is enforceable had not been complied with.

The duty to repair does not alone in such case authorize the making of the repairs by the commissioners of one of two towns jointly liable and the maintenance of an action against the commissioner of the other town to recover its proportion; it must appear that notice was given as prescribed by statute (§ 3, chap. 225, Laws of 1841, as amended by chap. 383, Laws of 1857), and that the commissioner notified did not within the time prescribed consent or did not unite in making the repairs.

(Argued October 28, 1889; decided December 10, 1889.)

APPEAL from judgment of the General Term of the Supreme Court, in the third judicial department, entered upon an order made May 4, 1886, which affirmed a judgment in favor of plaintiffs, modified and affirmed as modified a judgment in favor of plaintiffs, entered upon the report of a referee.

This action was brought to recover back money alleged to have been paid by plaintiff in repairing a bridge in excess of his proportionate share of plaintiff's town.

The referee found among other facts that the Hoosick river divides the towns of Hoosick, in Rensselaer county, from the towns of Cambridge and White Creek, in Washington county. That a bridge forming part of a public highway extended across said river from the town of Hoosick to the towns of Cambridge and White Creek. The dividing line between the two last mentioned towns being the center of the highway and bridge on the Washington county side of the river. That in the summer of the year 1879 the commissioners of highways met and determined to repair said bridge. That subsequently and prior to the first day of November of that year they duly and lawfully caused the necessary repairs to be made to the satisfaction of the commissioners of highways of said towns. The total cost thereof was \$2,076.81. The

Statement of case.

commissioners of highways of the town of Hoosick paid out and disbursed for materials and labor the sum of \$1,026.28. The commissioner of the town of White Creek paid out the sum of \$550.78, and the commissioner of the town of Cambridge, \$499.75 for a like purpose. When the repairs were completed the several commissioners accounted with each other, the Hoosick commissioners assuming and paying what was then understood and agreed to be one-half, and the other commissioners each what was then understood and agreed to be one-quarter of the net expenses. No part of the moneys expended by the plaintiff in making the repairs came to or went through the hands of the commissioner of highways of Cambridge; and only two items of Hoosick's funds came to the hands of the White Creek commissioner; one placed in his hands for the purpose of paying a certain designated bill, and the other in payment of balance on final settlement. That during all the time the repairs were being made, up to and including the final settlement, the commissioners of highways of each of the Towns supposed that under the law one-half of the expenses of the repairs was to be defrayed by the Hoosick commissioners, and one-quarter thereof by the commissioner of each of the towns of White Creek and Cambridge. That the commissioners of these towns had a settlement and accounting of such expenditures with full knowledge of all the facts, and mutually agreed upon the amount thereof, and the amount to be paid by each, and the same was paid accordingly. That the original defendant commissioners did their full duty to the public in providing the repairs in question and did not refuse to unite in making the repairs but did so unite.

Further facts are stated in the opinion.

Nathaniel C. Monk for appellant. Chapter 225 of the Laws of 1841, as amended by chapter 383 of the laws of 1857 (788-790), does not apply to the case at the bar. (*Oakley v. Marnaroneck*, 39 Hun, 448; *People v. Town Auditors*, 75 N. Y. 319.) The complaint does not state, nor does the referee

Statement of case.

find, facts sufficient to show that defendant's town is, or ever was, liable with the other towns, or otherwise, to make or maintain the bridge in question, or any part of it. It does not state facts sufficient to bring the defendant within the provisions of the act of 1841, as amended in 1857. (2 R. S. [7th, ed.]; 1259 *Beckwith v. Whalen*, 65 N. Y. 325; 70 N. Y. 433; 4 Abb. L. J. 38 *Town of Galena, C. & R. P. R. Co.* 27 Barb. 551, 552; *People v. Bd. of Super.*, 93 N. Y. 397, 401, 402, 403; Laws of 1837, chap. 51; Laws of 1837, chap. 214; Laws of 1838, chap. 254; Laws of 1839, chap. 291; Laws 1840, chap. 343; *People v. Town Auditors*, 75 N. Y. 319; *City of Buffalo v. Holloway*, 7 id. 493, 498.) But conceding that under the acts of 1841 and 1857, and the *Lapham case*, the three towns were once, or formerly, jointly and equally liable to maintain the bridge, it was within the power of the legislature to change, or remove, either the liability, or the *proportion* of liability. (*Dash v. Vankleek*, 7 John 496-7; *Harrington v. Trustees*, 10 Wend. 547; *Roosevelt v. Godard*, 52 Barb. 534; *People v. Brooklyn*, 69 N. Y. 605; *Hackmann v. Pinkney*, 81 id. 211; Laws 1875, § 1; *People v. Super*, 1 Hill, 53; *Landers v. F. S. M. Church*, 97 N. Y. 119, 124; *Potter v. Greenwich*, 2 Hun, 333.) The action by town officers against town officer is wholly unauthorized by any allegation in the complaint or finding of the referee. (1 R. S. [7th ed.], 840, § 2; *Cornell v. Guilford*, 1 Den. 511; *Hathaway v. Cincinnati*, 62 N. Y. 447-8; *Marsh v. Little Valley*, 64 id. 115-16; *Horn v. New Lots*, 83 id. 105-7; *Sutherland v. Carr*, 85 id. 111, 112; *Bridges v. Bd. of Super.* 92 id. 570; *Biddleman v. State*, 110 id. 232; 31 Hun, 511, 512.) The complaint, the proof and facts found show that the moneys claimed were *voluntarily* paid, and there is no allegation that they were paid under agreement, or promise, or by request, nor under fraud, or mistake, nor by compulsion, or necessity. (*Siliman v. Wing*, 7 Hill, 159; *Mowatt et al. v. Wright*, 1 Wend. 355; *Supervisors v. Briggs*, 2 Den. 26, 39; *Doll v. Earle*, 65 Barb., 298; *N. Y. & H. R. R. Co. v. Marsh*, 12 N. Y. 308; *Flower v. Lance*, 59 id. 603; 31 Hun, 508; *Lyon v.*

Statement of case.

Richmond, 2 Johns. Ch. 51, 60; *Champlin v. Layton*, 18 Wend. 407; *Jacobs v. Morange*, 47 N. Y. 60; *Bilbe v. Lumeey*, 2 East. 183; *Clarke v. Dutcher*, 9 Cow. 674; *Broom v. Chesterville*, 63 Me. 241; *McCoy v. Lord*, 19 Barb. 18; *Wyman v. Farnsworth*, 3 id. 369; *Vanderbeek v. Rochester*, 46 Hun. 87, 91; *Carr v. Steward*, 58 Ind. 581, 584; *St. Louis v. Mathers*, 104 Ill. 257, 261; *Bryant v. Clark*, 45 Vt. 483; *Nat. Bk. v. Super.* 106 N. Y. 492-493; *Hill v. Super.*, 12 id. 57; *Bidwell v. Murray*, 40 Hun. 193; *Biddleman v. State*, 110 N. Y. 235; *Ward v. Southfield*, 102 id. 295; *Gailor v. Herriek*, 42 Barb. 85; *Onderdonk v. Brooklyn*, 31 id. 505, 507; *Rochester v. Rust*, 80 N. Y. 303, 302, 311; *People v. Board of Supervisors*, 93 id. 403; *Rector v. Mayor, etc.*, 10 How. Pr. 138; *N. Y. & H. R. Co., v. Marsh*, 12 N. Y. 309; *Floer v. Lance*, 59 id., 604; *Super. v. Briggs*, 2 Den. 26; *First National v. Lamb*, 57 Barb. 434; *Almy v. Harris*, 5 Johns. 175; *Dudley v. Mayhew*, 3 N. Y. 9, 15; *Campbell v. Grooms*, 101 Penn. St. 481, 484; *Nat. B'k v. Super.*, 106 N. Y. 492, 493; *People v. Everett*, 93 id. 397.) The facts expressly found by the referee, upon sufficient proofs, require judgment for defendant. (*Swinger v. Raymond*, 83 N. Y. 199; *Brownell v. Griswold*, 89 id. 127; *People ex rel. v. Super.* 93 id. 397, 403; *People ex rel. v. Town Auditors*, 74 id. 311, 314, 315; 75 id. 316; *Super. v. Birdsall*, 4 Wend. 460; *People v. Stephens*, 71 N. Y. 527; 52 id. 306; *Curnew v. Mayor, etc.*, 79 id. 511; *Gifford v. Town of White Plains*, 25 Hun. 606; *Super. v. Birdsall*, 4 Wend. 453; *Parr v. Village of Greenbush*, 112 N. Y. 246; *Lockwood v. Thorn*, 11 id. 170; *Johnson v. Hartshorn*, 52 id. 178; *Horn v. Town of New Lots*, 83 N. Y. 105, 107; *Smith v. Wright*, 27 Barb., 621; *Hines v. City of Lockport*, 50 N. Y. 238; *Cornell v. Guilford* 1 Den. 511; *Albro v. Rood*, 24 Hun. 74; *Hathaway v. Cincinnatus*, 62 N. Y. 447; *Sutherland v. Carr*, 85 id. 111.

R. A. Parmenter for respondent. The action was properly brought by the commissioners of highways of the town of

Statement of case.

Hoosick in their official capacity against the commissioner of highways of the town of White Creek, in his official capacity. (*Supervisor v. Stimson*, 4 Hill, 136; *Overseers, etc. v. Overseers, etc.*, 18 John. 407; *Todd v. Birdsall*, 1 Cow. 260; *People v. Super.* 32 N. Y. 477; *Looney v. Hughes*, 26 id. 516; *Com. v. Peck*, 5 Hill, 215; *Victory v. Blood*, 25 Hun, 517; Code Civ. Proc. §§ 1926, 1927, 1930, 3356, art. 2, title 5, chap. 15.) Under the Revised Statutes and under chapter 225 of the Laws of 1841, as amended by chapter 383 of the Laws of 1857, the duty of repairing public bridges is clearly imposed on the town to be discharged by the commissioners of highways. (*Hill v. Bd. of Super.*, 12 N. Y. 52; *Phelps v. Hawley*, 52 id. 23-27; *Thompson on Highways*, [Mills ed.] 91, 350, 354; *Beckwith v. Whalen*, 70 N. Y. 430-434; *People ex rel. v. Super.*, 68 id. 118; *Day Com. v. Day Com.*, 94 id. 153; *Spier v. Com.* 20 N. Y. S. R. 392-393; *People ex rel. v. Com.*, 63 id. 472; *Lapham v. Rice*, 55 id. 472; *Beckwith v. Whalen*, 65 id. 327, 328; 70 id. 434, 437; *Theal v. Yonkers*, 31 Hun, 267; *Harris v. Houck*, 57 Barb. 619; *Thompson on Highways* [Mill's ed.] 364-5.) There is no force in the plaintiff's argument that the act of 1841, as amended by chapter 383, Laws of 1857, was repealed or superceded by the statute of April 15, 1857, known as chapter 639, Laws of 1857. (*Beckwith v. Whalen*, 65 N. Y. 327, 328, 329.) The remedy provided in the act of 1857 and amendment thereof is merely cumulative, and not having been invoked by the towns interested nor provided by the board of supervisors of either county in which the bridge was located, the powers and duties imposed on the towns and highway commissioners remain in full force. (*Day v. Day*, 94 N. Y. 153.) The action could not have been maintained against the town in its corporate name. (*Morey v. Town of Newfane*, 8 Barb. 645; *People ex rel. v. Town Auditors*, 74 N. Y. 315; *Lorillard v. Town of Monroe*, 11 N. Y. 392; *People ex rel. v. Town Auditors*, 75 id. 316, 319; *Donnelly v. Town of Ossing*, 18 Hun. 352; *Day v. Day*, 94 N. Y. 153.) The action was not maintainable in the name of the supervisors of the town of

Opinion of the Court, per PARKER, J.

Hoosick. (*Hoosick v. Rogers*, 25 Wend. 313, 354; *Hurdenburgh v. Crary*, 50 Barb. 32, 34; *Bell v. Day*, 32 N. Y. 185-6.) The referee's findings of the fact established the plaintiff's cause of action and he therefore committed no error in refusing to dismiss the complaint. (*Rheel v. Hicks*, 25 N. Y. 289, 292; *Gaylor v. Herrick*, 42 Barb. 86-7; *Brewster v. Striker*, 2 N. Y. 19, 41; *Nathey v. Graves*, 19 Conn. 548; *Moses v. MacFarlane*, 2 Burr. 1002; *Kingston Bank v. Eltinge*, 40 N. Y. 391, 395; *U. Nat. Bank v. S. Nat. Bank*, 43 id. 450.) The defendant's point that the action cannot be maintained because the plaintiffs did not give the defendant twenty days' notice in writing of the necessity for the repairs to the bridge is unavailing. There was no necessity for such notice and if there had been it could have been waived and was waived. (*Day v. Day*, 94 N. Y. 160; *People ex rel v. Albright*, 23 How. Pr. 310; *People ex rel v. Com.*, 24 Wend. 367, 369. Nor were the plaintiffs under the statute of 1841, as amended in 1859 required to bring a joint action against the highway commissioners of the towns of Cambridge and White Creek, (Laws 1857-82). (*Harris v. Houck*, 57 Barb. 619.

PARKER, J. Assuming but not deciding the existence of a liability on the part of the towns of Hoosick, Cambridge and White Creek, to maintain the bridge in question, and that because of such liability the statute imposed upon each of said towns the duty and obligation of bearing one-third of the expense thereof, we are nevertheless of the opinion that plaintiff cannot prevail in this action.

The recovery sought to be upheld, is not for moneys paid to the defendant, but for moneys paid by the plaintiff to other parties in excess of the sum he was legally bound to pay. Each commissioner was legally obligated to pay one-third of the expense of the repairs. They however did not so interpret the statute. According to their understanding of their respective obligations the duty of Hoosick's commissioner was to pay one-half, and the commissioners of each of the other towns one-fourth. What they understood to be

Opinion of the Court, per PARKER, J.

their legal duty each of them did. The plaintiff paid out for materials and labor one-half of the total expense. Subsequently they accounted to and with each other and adjusted their accounts on that basis. The board of town auditors of each town audited the accounts of their respective commissioners, and thereafter they were reimbursed from moneys levied and collected from the taxable property of the town. The excessive payment made by the plaintiff was not made at defendant's request. It was not induced by any fraud or improper conduct on the part of the defendant, but on the contrary, was made with full knowledge of all the facts and circumstances growing out of and connected with the repair of the bridge. The error on the part of the plaintiff was one of law, not of fact. In the words of Judge BRONSON in *Silliman v. Wing*, (7 Hill, 159,) the plaintiff commissioner "settled for himself a question of law and concluded to pay the whole amount * * * I take the general rule to be well settled that money paid under such circumstances cannot be recovered back."

Judge DANFORTH, in *National Bank v. Board of Supervisors* (106 N. Y. 488,) states the rule as follows: "No person can make himself a creditor of another by voluntarily discharging a duty which belonged to that other; and no obligation can be implied in law from a voluntary payment of the debt of another, without his request, by one who is under no legal liability or compulsion to make it."

This doctrine has been frequently asserted and is well settled. (*Mowatt v. Wright*, 1 Wend., 355; *Vanderbeck v. Rochester*, 46 Hun, 87; *Supervisors of Onondaga Co. v. Briggs*, 2 Denio, 26; *Doll v. Earle*, 65 Barb. 298.)

The rule was applied to a corporation seeking to recover back moneys paid by one of its officers for an illegal tax. (*N. Y. & H. R. R. Co. v. Marsh*, 12 N. Y. 308.)

It was held to apply to a guardian, who under a mistake of law paid out the money of his ward. (*Flower v. Lance*, 59 N. Y. 609.)

No reason suggests itself for refusing to apply the doctrine

Opinion of the Court, per PARKER, J.

to a commissioner of highways under the circumstances here disclosed. Plaintiff was not an agent of the town possessing generally authority to disburse its moneys. He did not have the power to represent or affect the town otherwise than in the manner provided by statute. The statute did not confer upon him the authority to burden his town with a greater proportion of the expense of repair than one-third. He could not have enforced reimbursement from the town of Hoosick for the excess. When he exceeded the statutory limit the act was individual and not official. Such act subjected him, in respect thereto, to the legal application of the rule relating to voluntary payments. The town could not, and did not, by subsequently reimbursing the plaintiff in the amount expended by him in excess of his authority, alter or effect the legal status of the parties as it existed prior to such reimbursement.

Again, the action is not maintainable because the requirements of the statute establishing the precedent condition upon which the liability of a town is created and enforceable has not been complied with. By means of a judgment, declared to be rendered against the defendant commissioners of highways in his official capacity the plaintiff seeks to enforce the payment of a sum of money, claimed to have been expended for the benefit of defendant's town. In the administration of the highway system, the commissioner of highways is an independent public officer, exercising public power and charged with public duties, specially prescribed by law. While acting in that capacity, by virtue of powers conferred by statute he proceeds independently of any direction on the part of the town. On the other hand, he is without power to represent or affect the rights of the town in any other manner than prescribed by statute. (*People ex rel. v. Board of Supervisors*, 93 N. Y. 397.)

Previous to the enactment of chapter 700 of the Laws of 1881, towns were exempt from the burden of any general duty in respect to roads and bridges. Neither were the highway commissioners charged with any duty unless provided with

Opinion of the Court, per PARKER, J.

funds by their towns, or especially commanded and empowered by statute. (*Town of Galen v. C. & R. P. R. Co.*, 27 Barb. 543.)

The imposition of liability upon towns for the repair of roads and bridges in any other manner than provided by statute, is contrary to the settled policy of the law, and not permissible. (*People ex rel. v. Board of Supervisors, supra.*)

A commissioner of highways is powerless to burden the town he represents beyond the statutory limitations. Certainly he cannot affect the rights and obligations of other towns unless the statute so provides. When it does so provide, he may, if he follows the letter and spirit of the statute, but not otherwise. Had this plaintiff repaired the bridge without giving any notice to the other towns, would it have been urged for a moment that an action could be maintained against the other towns for two-thirds of the expense? Assuredly not, because the commissioner of highways of one town can not create a liability on the part of another town, except he obey the statutory conditions which authorize it. The court below, in its argument supporting the liability of defendant, said that one commissioner had no right to "contribute more than one-third of the expense, and to contribute less was the non-performance of the full duty. * * * It was not the less the non-performance of a legal duty on the part of those who paid too little, because made through their mistake of the law. The obligation remained to perform the unperformed duty, and the way to perform that obligation was to be found by paying the money to the officer whose receipt of it would be effectual to discharge it, namely, to the commissioner of the town of Hoosick. His right to receive was the reciprocal of their right to pay, and when they refused to do this duty, an action accrued to him to whom the duty was due, to enforce it." It will be observed that the argument quoted is not applicable to the case suggested, because, while it is true the duty to unite in making the repairs exists, the liability to respond to the commissioner making them is nevertheless dependent upon the giving of the notice required by statute.

Opinion of the Court, per PARKER, J.

It is obvious, therefore, that the duty to repair does not of itself authorize the maintenance of an action.

The right of recovery is further made dependent upon the performance or non-performance of certain statutory conditions. The conditions precedent to the maintenance of such an action, are provided in section 3 of chapter 225 of the Laws of 1841, as amended by chapter 383 of the Laws of 1857, which reads as follows: "If the commissioners of highways of either of such towns, after notice in writing from the commissioners of highways of any other of such towns, shall not within twenty days give their consent in writing to build or repair any such bridge, and shall not within a reasonable time thereafter do the same, it shall be lawful for the commissioner so giving such notice to make or repair such bridge, and then to maintain a suit at law in their official capacity against said commissioners so neglecting or refusing to join in such making and repairing."

It is apparent, from the section quoted as we have already observed, that if a commissioner repair a bridge, without giving notice to the commissioners of the towns jointly liable, he cannot recover their proportion of the expense because of his failure to comply with the requirements of the statute. So, too, if the commissioners notified consent to the making of the repairs, and thereafter unite in their making, he cannot maintain an action, because their compliance with the statute deprives him of a basis for its maintenance.

The referee has found, as a fact, that the original defendant commissioner "did not refuse to unite in making the repairs, but did so unite," and that he "did his full duty to the public in providing the repairs in question."

The evidence did not permit a different finding in that respect. It is undisputed that the three commissioners worked together until the repairs were completed. Each paid in behalf of his town for labor and materials. The plaintiff paying one-half, and the commissioners of the other towns each one-fourth. That which they mutually regarded to be their duty under the law they did. After a final adjustment of

Statement of case.

their accounts on such basis they respectively submitted their accounts for audit. The accounts as presented were audited and each of the commissioners were thereafter reimbursed by taxes collected from such towns.

In view of the finding that the defendant did unite in making the repairs, and that he did his full duty in that respect it is obvious that the court cannot give to a voluntary payment made by one of the commissioners with full knowledge of all the facts the force and effect necessary to over-ride such finding. There cannot be predicated upon such fact, under the circumstances proven to have existed, a holding that the defendants neglected to repair.

It follows that the liability of the defendant in this action has not been established.

The judgment should be reversed and a new trial granted, costs to abide event.

All concur, except POTTER, J., not sitting.

Judgment reversed.

BENJAMIN F. TABOR, Respondent, v. WILLIAM M. HOFFMAN
Appellant.

In an action to restrain defendant from using certain patterns of a pump alleged to have been surreptitiously copied from patterns belonging to plaintiff which had not been made public, it appeared that plaintiff had invented a pump the patent for which had expired; that he was manufacturing and selling a pump containing various improvements upon the original without having patented them; such improvements were incorporated in his patterns; these he kept in his exclusive possession, and never made them public. Defendant hired a man who was employed by plaintiff to repair the patterns, to make copies of them. Plaintiff's pump as put upon the market, does not conform to the patterns, because it is made of brass and iron, which expand unequally in the finished casting and contract unequally when cooling, during the process of casting and therefore the size of the patterns could not be discovered by merely using the different sections of the pump, but various changes were necessary which without the patterns could only be ascertained by experiments involving the expenditure of money and time. *Held* (FOLLET, Ch.

Statement of case.

J., dissenting), that plaintiff was entitled to the relief sought; that the patterns were a secret device which plaintiff had not published by putting his improved pump on the market unpatented, and which was his exclusive property until he abandoned it by publication or it was fairly discovered by another.

An inventor has, independent of letters patents, an exclusive property in his invention, until by publication it becomes the property of the public. Reported below (41 Hun, 5).

(Argued October 29, 1889; decided December 10, 1889.)

APPEAL from judgment of the General Term of the Supreme Court, in the fifth judicial department, entered upon an order made October 22, 1886, which affirmed a judgment in favor of plaintiff, entered upon the decision of the court on trial at Special Term.

The object of this action was to restrain the defendant from using certain patterns alleged to have been surreptitiously copied from patterns belonging to the plaintiff that had not been made public.

The trial court found that the plaintiff, having invented a pump known as "Tabor's Rotary Pump," which was patented, made a complete set of patterns to manufacture the same; that he necessarily spent much time, labor and money in making and perfecting such patterns, which were always in his exclusive possession; that from time to time he made improvements upon the pump and incorporated the same in the patterns, which were never thrown on the market nor given to the public; that one Francis Walz, after the patents had expired, surreptitiously made for the defendant a duplicate set of said patterns from measurements taken from the patterns of the plaintiff, without his knowledge or consent while they were in the possession of said Walz to be repaired; that before the commencement of this action the defendant, with knowledge of all these facts and without the consent of the plaintiff, had commenced to make and since then has made pumps from said patterns, thus obtained; that the plaintiff has established a large and profitable trade in said pumps which "will be injured and the plaintiff damaged, if the defendant is permitted" to continue to manufacture from said patterns.

Statement of case.

The trial court further found, upon the request of the defendant, "that a competent pattern-maker can make a set of patterns from measurements taken from the pump itself without the aid of plaintiff's patterns," but refused to find, upon the like request, that this could be done "with little more expense and trouble than from measurements taken from plaintiff's said patterns."

It appears from the evidence that the finished pump "does not comply with the patterns," because it is made of brass and iron which expand unequally in the finished casting and also contract unequally when cooling during the process of casting; that some of the patterns are subdivided into sections, which greatly facilitates measurements and drawings, as each section can be laid flat upon the wood or paper; and that it would take longer to make a set of patterns from the pump than it would to copy the perfected patterns themselves.

The Special Term by its final decree, restrained the defendant "from manufacturing any more pumps from the set of patterns made by Francis Walz from measurements taken from the plaintiff's patterns * * * and from selling, disposing of or using in any manner said patterns."

Brundage & Chipman for appellant. Plaintiff cannot maintain this action in equity, for he has an adequate remedy at law. (*Avery v. E. W. Co.*, 82 N. Y. 582; *Jerome v. Ross*, 7 Johns. Ch. 315; *Hart v. Mayor, etc.*, 9 Wend. 571; *Watson v. Hunter*, 5 Johns. Ch. 169; *Camp v. Matheson*, 30 Ga. 170; *Banks v. Busey*, 34 Md. 437; *Murphy v. Harrison*, 29 Ark. 340; *Harkinson's Appeal*, 78 Pa. 196; *Balcom v. Julien*, 22 How. 349; *Whittlesy v. H. etc.*, R. R. Co. 23 Conn. 421; *T. & B. R. R. Co. v. B. etc.*, R. R. Co., 86 N. Y. 107; *Hyatt v. Bates*, 40 id. 164; *Thompkins v. Hawkins*, 13 W'kly Dig. 367; *Hepp v. Babin*, 18 How. [U. S.] 271.) He had no exclusive property in his invention, time, labor and expense. (*Potter v. McPherson*, 21 Hun, 559, 563; *Shook v. Daly*, 49 How. 366; *Palmer v. De Witt*, 47 N. Y. 532; *Dudley v. Mahew*, 3 id. 9; *Curtis on Patents*, 19;

Statement of case.

Clemens v. Belford, 14 Fed. Rep. 728; *Wheaton v. Peters* 8 Pet. 591; 2 Parsons on Contracts, 257; 2 Kent Com. 366; *Wees v. Peltzer*, 75 Ill. 475; *Little v. Hall*, 18 How. [U. S.] 170; *Wall v. Gordon*, 12 Abb. [N. S.] 349.) If plaintiff was deprived of his property, he may be compensated in damages. *Blake v. Brooklyn*, 26 Barb, 301; *Youngblood v. Youngblood*, 54 Ala. 486; *Huff v. Ripley*, 58 Ga. 11.) If a patent expires between the time of filing the bill and the hearing, no injunction will be allowed against the future use of the article. (High on Inj. § 623. *Imlay v. Norwich*, 4 Blatch, 227; *Mersoon v. Pease*, 24 Fed. Rep. 741; *Adam v. Huvars*, 19 id. 317; *Watson v. Hunter*, 5 Johns. Ch. 139; *Monk v. Harper*, 3 Edw. Ch. 159; *Hepp v. Babin*, 18 How. (U. S.) 271; *Kendall v. Windsor*, 21 id. 322; *Deming v. Chapman*, 11 How. Pr. 382; *Oertel v. Jacoby*, 44 id. 179; *Cobbett v. Woodward*, 3 Eng. Rep. 795; 14 Eq. Cas., 407; *Clark's Appeal*, 107 Penn. St. 436; *Rees v. Peltzer*, 75 Ill. 475; *Watson v. Hunter*, 5 Johns. Ch. 169.) Equity will not entertain an action merely to redress a wrong already committed; the remedy is at law; injunction is a preventive, not a punitive remedy. (*Monk v. Harper*, 3 Edw. Ch. 109; Willard's Eq. Juris. 441; *People ex rel. v. Clark*, 70 N. Y. 518; *Att'y-Gen. v. N. J. & C. R. R. Co.*, 2 Green's Ch. 136; *L. C. Nat. Bank v. Gunyan*, 6 Bush, 486; *Coker v. Simson*, 7 Cal. 340.) An injunction will not be granted in new cases not coming within well established principles. (*Dickey v. Reed*, 78 Ill. 261; *Mingg's Appeal*, 82 Penn. St. 373; *Ramsey v. E. R. R. Co.*, 38 How. Pr. 193.) Nor will a court of equity interfere to prevent an injury merely nominal or theoretical in its nature, although an action at law might be maintained for it. (*Bassett v. Salesbury*, 15 J. & S. 426; *Walrous v. Rodgers*, 16 Tex. 410.) After publication any one may copy directly from the article in the market. (*Rees v. Peltzer*, 475; *Oertel v. Jacoby*, 44 How. Pr. 179; *Cobbett v. Woodward*, 3 Eng. Rep. 795.)

Opinion of the Court, per VANN, J.

in this case were the exclusive property of the plaintiff, in his exclusive possession, and to which he was entitled to exclusive use. (*Thompson v. Standhope*, Ambler, 737; *Duke of Queensbury v. Shebbeare*, 2 Eden, 329; 3 Waite's Actions and Def. 743; *Thompson v. Standhope*, Ambler, 737; *Duke of Queensbury v. Shebbeare*, 2 Eden, 329; *Sittle v. Hall*, 18 How. [U. S.] 170; *Palmer v. De Witt*, 40 How. Pr. 295; 47 N. Y. 532; *Pope v. Carl*, 2 Aik. 342; *Perceval v. Phipps*, 2 Ves. & B. 19; *Woolsey v. Sudd*, 11 How. Pr. 49; 4 Duer, 379; *Peabody v. Norfolk*, 98 Mass. 452; *Morrison v. Moat*, 21 L. J. [U. S.] 248; 20 id. 513; *Hammer v. Barnes*, 26 How. Pr. 174; *Kiernan v. M. L. I. Co.*, 50 id. 194.) The fact that defendant could have made a set of patterns from a finished pump does not by any means give him the right to have a duplicate set made from plaintiff's patterns while in the hands of plaintiff's employe for repairs, or to make use of such duplicates. (*Kelly v. Morris*, L. R. [1 Eq. Div.] 697; *Cox v. S. & W. J. Co.*, L. R. [9 id.] 322; *Kiernan v. M. L. I. Co.*, 50 How. Pr. 198; *McGowin v. Remington*, 12 Penn. 56; *Gray v. Russell*, 1 Story, 11; *Farmer v. Calvert*, 7 Am. L. Rep. 365; *Williams v. W. U. T. Co.*, 17 J. & S. 140.) The mere fact that some of the pieces of patterns made for the defendant are not like the plaintiff's, does not prevent the plaintiff from obtaining an injunction, because it clearly appears that most of the duplicates (all but one, the stand, out of thirty odd pieces) were made from measurements taken directly from plaintiff's patterns. (*Sampson v. Rose*, 65 N. Y. 411, 421; *Starr v. Winnegar*, 3 Hun, 491.)

VANN, J. It is conceded by the appellant that, independent of copyright or letters patent, an inventor or author, has, by the common law, an exclusive property in his invention or composition, until by publication it becomes the property of the general public. This concession seems to be well founded and to be sustained by authority. (*Palmer v. De Witt*, 47 N. Y. 532; *Potter v. McPherson*, 21 Hun, 559; *Hammer v. Barnes*, 26 How. Pr. 174; *Kiernan v. M. Q. Tel. Co.* 50

Opinion of the Court, per VANN, J.

id. 194; *Woolsey v. Judd*, 4 Duer, 379; *Peabody v. Norfolk*, 98 Mass. 452; *Salomon v. Hertz*, 40 N. J. Eq. Rep. 400; Phillips on Patents, 333-341; Drone on Copyright, 97-139.)

As the plaintiff had placed the perfected pump upon the market, without obtaining the protection of the patent laws, he thereby published that invention to the world and no longer had any exclusive property therein. (*Rees v. Peltzer*, 75 Ill. 475; *Clemens v. Balford*, 14 Fed. Rep. 728; Short's Laws of Literature, 48.)

But the completed pump was not his only invention, for he had also discovered means, or machines in the form of patterns, which greatly aided, if they were not indispensable, in the manufacture of the pumps. This discovery he had not intentionally published, but had kept it secret, unless by disclosing the invention of the pump, he had also disclosed the invention of the patterns by which the pump was made. The precise question, therefore, presented by this appeal, as it appears to us, is whether there is a secret in the patterns that yet remains a secret, although the pump has been given to the world? The pump consists of many different pieces, the most of which are made by running melted brass or iron in a mold. The mold is formed by the use of patterns, which exceed in number the separate parts of the pump, as some of them are divided into several sections. The different pieces out of which the pump is made are not of the same size as the corresponding patterns, owing to the shrinkage of the metal in cooling. In constructing patterns it is necessary to make allowances, not only for the shrinkage, which is greater in brass than in iron, but also for the expansion of the completed casting under different conditions of heat and cold, so that the different parts of the pump will properly fit together and adapt themselves by nicely balanced expansion and contraction to pumping either hot or cold liquids. If the patterns were of the same size as the corresponding portions of the pump, the castings made therefrom would neither fit together, nor if fitted, work properly when pumping fluids varying in temperature. The size of the patterns cannot be discovered by

Opinion of the Court, per VANN, J.

merely using the different sections of the pump, but various changes must be made and those changes can only be ascertained by a series of experiments, involving the expenditure of both time and money. Are not the size and shape of the patterns, therefore, a secret which the plaintiff has not published and in which he still has exclusive property? Can it be truthfully said that this secret can be learned from the pump when experiments must be added to what can be learned from the pump before a pattern of the proper size can be made? As more could be learned by measuring the patterns, than could be learned by measuring the component parts of the pump, was there not a secret that belonged to the discoverer, until he abandoned it by publication, or it was fairly discovered by another?

If a valuable medicine, not protected by patent, is put upon the market, anyone may, if he can by chemical analysis and a series of experiments, or by any other use of the medicine itself aided by his own resources only, discover the ingredients and their proportions. If he thus finds out the secret of the proprietor, he may use it to any extent that he desires without danger of interference by the courts. But, because this discovery may be possible by fair means, it would not justify a discovery by unfair means, such as the bribery of a clerk, who in course of his employment had aided in compounding the medicine, and had thus become familiar with the formula. The courts have frequently restrained persons, who have learned a secret formula for compounding medicines, beverages and the like while in the employment of the proprietor, from using it themselves or imparting it to others to his injury, thus in effect holding, as was said by the learned General Term, "that the sale of the compounded article to the world was not a publication of the formula or device used in its manufacture." (*Hammer v. Barnes, supra*; *Morison v. Moat*, 21 L. J. [N. S.] 248; *S. C.*, 20 id. 513; *Green v. Folgham*, 1 Sim. & Stu. 398; *Yovatt v. Winyard*, 1 Jac. & Walk. 394; *Peabody v. Norfolk, supra*; *Salomon v. Hertz, supra*; Kerr on Injunctions, 181; High on Injunctions, § 663.)

Dissenting opinion, per FOLLETT, Ch. J.

The fact that one secret can be discovered more easily than another, does not affect the principle. Even if resort to the patterns of the plaintiff was more of a convenience than a necessity, still if there was a secret, it belonged to him, and the defendant had no right to obtain it by unfair means, or to use it after it was thus obtained. We think that the patterns were a secret device that was not disclosed by the publication of the pump, and that the plaintiff was entitled to the preventive remedies of the court. While the defendant could lawfully copy the pump, because it had been published to the world, he could not lawfully copy the patterns because they had not been published, but were still, in every sense, the property of the plaintiff, who owned not only the material substance, but also the discovery which they embodied.

The judgment should be affirmed, with costs.

FOLLETT, Ch. J. dissenting: An inventor of a new and useful improvement has a right to its exclusive enjoyment, which right he may protect by a patent or by concealment. The plaintiff's patent had expired and all of the parts of the pump represented by the patterns had been for a long time on sale in the form of a completed pump. The patent on the original invention having expired and the plaintiff having voluntarily made the subsequent improvements public by selling the improved article, he lost his right to their exclusive use. The plaintiff's counsel concedes this; but says that while patterns could be made from the several parts of the pump, from which pumps like those made and sold by the plaintiff could be produced, that it was more difficult to make patterns from sections of the pump than from the patterns. This was so found by the court and cannot be gainsaid. The invention was not the patterns but the idea represented by them, to which the plaintiff had lost his exclusive right. Neither the defendant nor the man who made the patterns sustained any relation by contract with the plaintiff. They were neither the servants nor partners of the plaintiff, and they owed him no duty not owed by the whole world. The act, at most, was a

Statement of case.

trespass and the plaintiff made no case for equitable relief. It is neither asserted nor found that the defendant is unable to respond in damages. The cases cited to sustain the judgment arose out of the relation of master and servant or between partners, and in all of them the idea had not been disclosed to the public, but had been kept secret by the inventor.

The judgment should be reversed and a new trial granted, with costs to abide the event.

All concur with VANN, J., except FOLLETT, Ch. J. dissenting, and BRADLEY and HAIGHT, JJ., not sitting.

Judgment affirmed.

CYRUS D. HIBBARD, Appellant, v. CHAUNCEY RAMSDELL et al.,
Respondents.

On May 1, 1816, M., who owned a large tract of land executed a lease of a portion of it for three lives named for an annual rent reserved, which lease on February 18, 1879, had become vested in plaintiff who on that day entered into a written contract with defendant to sell him his right and interest for a sum to be paid in six annual installments; R. to pay also the annual rent reserved. There was no agreement on the part of plaintiff to apply for or take a new lease of the premises. At the time of making the contract none of the lives upon which the lease rested were in being, but neither party knew this. R. paid to plaintiff the rent reserved in the original lease in 1879 and 1880 and he paid it over to the representatives of the original lessor. R. also paid two installments under the contract. It was the custom of M. on the expiration of a lease to give the tenant in possession, if satisfactory, a chance to take a new lease for ten years at a rent to be determined by the appraisal of the rental value of the land made by the lessor or his agents. In June, 1880, the agent of M.'s successor in interest entered upon said premises and finding R. in possession leased the same to him at a newly appraised rent. The agent knew of the relations between plaintiff and R. H. brought this action to have the lease to R. declared to be for his benefit and held as security for the payment of the contract price on the sale by him of the original lease. *Held*, that no such confidential or fiduciary relations existed between the plaintiff and R. as would require the latter to assign his lease to the former; that the relation created between them by their contract was not that of landlord and tenant or of trustee and *cestui que trust*, but a relation analogous

Statement of case.

to that of vendor and vendee; and that therefor the action was not maintainable.

(Argued October 30, 1889; decided December 10, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made July 1, 1886, which affirmed judgment dismissing the complaint entered upon a decision of the court on trial at Special Term.

This action was for equitable relief, *i. e.*, that a certain lease dated October 1, 1880, made and executed to the defendant Ramsdell by defendant Dix, be declared to be made for the benefit of the plaintiff and held as security for the contract price upon the alleged sale of a lease-hold interest in the premises described in the lease by the plaintiff to Ramsdell, and that said purchase-price be adjudged to be a lien upon Ramsdell's lease-hold in the premises and that plaintiff's interest be declared prior to the interest of Ramsdell and that said Ramsdell be adjudged to account for the income and profits of the premises and that the plaintiff recover judgment for the amount due upon the purchase-price of the premises.

From the findings in the case, it appears that on the 1st day of May, 1816, John J. Morgan, who was seized in fee simple of the premises described in the complaint and in the lease, on that day executed a lease to Resolved W. Fenner during the lives of Christopher C. Fenner, John A. Fenner and Lydia Fenner and the survivor or survivors of them at the annual rent of twenty dollars and thereupon said lessee entered into the possession of the premises. At the date of the execution of said lease, Christopher C. Fenner was fifteen years of age; John A., seven years of age and Lydia about twelve years of age; that through divers mesne conveyances and assignments the lessee's interest became vested in the plaintiff, Cyrus D. Hibbard; that on the 18th day of February, 1879, said Hibbard and the defendant Ramsdell entered into a written contract by which the plaintiff agreed to sell and Ramsdell to purchase the said lease in consideration of

Statement of case.

\$800 to be paid in installments. At the time of entering into said contract neither party thereto knew the fact that none of the lives upon which the lease rested were then in being, which was the fact. Ramsdell entered into the occupation of the premises. Thereafter and on May 1st, 1879, and May 1st, 1880, the defendant paid the rent reserved in said lease to the plaintiff, which rent was paid by plaintiff to the original lessor, his heirs or assigns. The defendant Ramsdell has paid under said contract, two installments leaving due thereon some \$604.90; at the time of the making of the contract between plaintiff and Ramsdell, it was not agreed between the parties, either in the contract or otherwise, that the defendant should take any renewal of the ease of the land in the name or for the benefit of the plaintiff nor for himself or for any other.

Prior to 1879, the defendant Dix succeeded to the rights of the original lessor, Morgan. Said Morgan had been, prior and at the time of giving the lease in question, the proprietor of some five or six thousand acres of land in Brookfields, Madison county, and said land had been leased to various persons under similar leases as the one under consideration and upon the expiration of these leases, if the land was not sold by the lessor, it was the custom to give the tenant in possession, if he was a satisfactory tenant, the first chance to take a new lease for the term of ten years, if he was willing to take the same and pay the rent fixed therefor, which rent was determined by the appraisal of the rental value of the land made by the lessor or his agents; that in June, 1880, the agent of the defendant Dix entered upon the land in company with one Wait Clark, a former agent, and found the defendant in possession and appraised the rental value thereof at \$1,950, and fixed the annual rent at \$58.50 and informed the defendant that he must take a new lease for ten years at that annual rent or that the lessor would lease the land to another person. Ramsdell made no representations as to the existence or non-existence of the plaintiff's interest in the premises or in the original lease and did not disclose the terms of the contract between plaintiff and himself nor were the terms called for by

Statement of case.

the agent or alluded to in any manner. In receiving the rent for 1879 and 1880 the name of the plaintiff was entered upon the rent book as the person who paid the rent. At that time said Clark was an agent of the defendant Dix, kept the books with the receipt of the rent and knew the relations between the plaintiff and the defendant in respect to said land under said contract. Shortly after the time when defendant Dix's agent and said Clark made the appraisal and fixed the annual rent, he drafted a lease of said premises reserving an annual rent of \$58.50 and determinable in ten years from its date and sent it to Ramsdell and the same was duly executed by the defendant Ramsdell and the defendant Dix.

Sometime after October 1, 1880, the plaintiff in this action learned of the execution of the lease from Dix to Ramsdell and in 1882, demanded that the latter pay the installments past due and unpaid upon the contract and assign to him said lease as security for the performance of said contract, which demand Ramsdell refused to comply with but offered the plaintiff \$100 in discharge of further sums due upon said contract or offered to submit their differences to an arbitration. These offers the plaintiff declined and insisted upon his demand. The plaintiff in March, 1882, tendered to Ramsdell the rent which he had paid under the new lease with interest thereon which tender the latter declined to accept.

The trial judge found as conclusion of law that at the date of the contract February 1879, the plaintiff had no leasehold interest in the land and transferred no estate to the defendant Ramsdell and that the plaintiff was unable to transfer to the defendant the leasehold which he contracted to sell. That no fiduciary relations existed between the parties to this action in respect to the land or the original lease of May 1, 1816 or the lease of October 1, 1880 and directed a judgment, dismissing the complaint.

John H. Gibson for appellant. It is entirely immaterial whether the original lease contains any actual covenant of renewal. If one of several lessees secretly obtain a renewal

Opinion of the Court, per POTTER, J.

in his own name he will be treated as a trustee for all. (Wood's Land. Ten. 680; *Phyfe v. Wardell*, 5 Paige Ch. 268; *Burrell v. Bull*, 3 Sandf. Ch. 15; *Gibbs v. Jenkins*, 3 id. 130; *Anderson v. Lemon*, 8 N. Y. 236; *Ex parte Grau*, 1 B. & P. 376; *Palmer v. Young*, 1 Vern. 276; *Manlove v. Bale*, 2 id. 84; *Nesbitt v. Tredennick*, 1 Ball & B. 29-47; *Hamilton v. Dewey*, 1 id. 199; *Mulvany v. Dillon*, 1 id. 409; *Lucan v. Meritus*, 1 Wils. 34.) The contract of February 18, 1879, between plaintiff and defendant Ramsdell, created a fiduciary relationship between them. (2 Wash. on Real Prop. [4th ed.], 471; Willard on Real Est. 375; *Cowes v. Cornell*, 75 N. Y. 99-100; *In re Smith*, 95 id. 522; *Green v. Roworth*, 113 id. 470; 1 Story Eq. Jur. § 323.) Defendant is estopped by his contract. (*Mayor, etc., v. Huntington*, 114 N. Y. 631.) Defendant cannot now claim that a legal remedy exists because he has not pleaded it. (*Ostrander v. Weber*, 114 N. Y. 95; *Mench v. F. Nat. Bank*, 4 Hun, 466.) The plaintiff was entitled to be protected in his tenant's right of renewal. (Wood's Land. Ten. 680, 681; *Phyfe v. Wardell*, 5 Paige, 628; *Bennett v. Vansyckel*, 4 Duer, 462; *Lee v. Vernon*, 5 Brown's Parl. Cas. [10 Eng. ed.], 1803; *Mitchell v. Read*, 61 N. Y. 135; *Mitchell v. Read*, 84 id. 556; *Struthers v. Pearce*, 51 id. 357; *Gibbs v. Jenkins*, 4 Sandf. Ch. 131; *Holdridge v. Gillespie*, 2 Johns. Ch. 30; *Featherstonhaugh v. Fenwick*, 17 Vesey, 298; *Pickering v. Vowles*, 1 Brown's C. C. 197.)

Henry T. Utley for respondent.

POTTER, J. We do not deem it necessary in disposing of this appeal, in view of the very able opinions delivered by the Special and General Terms of the court below, to enter into a very full or elaborate discussion.

The judgment of the court below might well be affirmed upon the views presented in those opinions. It was held upon a consideration of the facts found by the learned trial court in this action, that there was no confidential, fiduciary or trust relations between the plaintiff and the defendant,

Opinion of the Court, per POTTER, J.

Ramsdell, at least, none that should require the latter to assign to the former the lease from defendant Dix, as security for the installments owing to plaintiff under the contract of purchase and sale.

The appellant's counsel has cited upon his brief a large number of cases establishing and illustrating the relations of trust and confidence between partners, lessees, executors and trustees. I have examined most of the cases referred to and they do not hold or determine, as it seems to me, that the relations between the plaintiff and Ramsdell under the contract between them, are of that character. In this statement I assume there was no agreement express, or implied, that Ramsdell would apply for or take a new lease of the premises for an additional term, either for his benefit or that of the plaintiff, or at all. No such agreement is alleged in the complaint and the trial court has found there was none in fact. The plaintiff is therefore compelled to rely for the existence of the fiduciary relations, which he invokes to give him the right to the renewal lease, upon the lease and contract. Now it seems to me that the relations created between plaintiff and Ramsdell, by virtue of that contract are not at all those of landlord and tenant, or of trustee and *cestui que* trust, but are those, or are analogous to those, which exist between vendor and vendee. By the express terms of the contract the plaintiff agrees to sell to Ramsdell all the former's right, title and interest, to the premises embraced in the old lease, or original lease; said "interest consists of a leasehold, purchased by and assigned to the defendant Ramsdell, upon payment of \$800," in installments with interest; said Ramsdell was also to pay the rent reserved in the original Morgan lease to plaintiff, and upon payment of said purchase money, the plaintiff agreed to execute and deliver an assignment of the Fenner lease to Ramsdell. This was but a contract by plaintiff to sell and by Ramsdell to purchase plaintiff's right, title and interest under the original lease. When this contract shall have been executed the result will be simply a quit claim deed without any covenants.

Opinion of the Court, per POTTER, J.

Thus it appears there were no covenants creating fiduciary or confidential relations, and the true relations as it seems to me are those which spring from the relation of vendor and vendee. From this relation the plaintiff claims that he is entitled to the second or renewal lease, or in other words, that the defendant Ramsdell was, in taking the new lease, the plaintiff's trustee or agent and made the new lease for the benefit of the plaintiff. I do not think the defendant Ramsdell owed the plaintiff any allegiance or duty of that character. In *Watkins v. Holman* (16 Peters, 54), it is said by the court in discussing such relations that "the relation of landlord and tenant in no sense exists between vendor and vendee." (*Osterhout v. Shoemaker*, 3 Hill, 513-518.) "The grantee takes the land to hold for himself and to dispose of it at his pleasure. He owes no faith or allegiance to the grantor, and he does him no wrong when he treats him as an utter stranger to the title."

It has been often held that the grantee in fee may purchase in an outstanding or hostile title to his grantor and fortify his own defective title, and thus make good to himself what his grantor's deed with his covenants failed to do. (*Kenada v. Gardner*, 3 Barb. 589.)

Was it ever claimed that a grantee under a deed containing the fullest covenants, but which conveyed no title to him because the grantor had none, could be compelled to give the title which such grantee had purchased from another, to his grantor, who took his money but gave him nothing for it? Or to state a case more nearly resembling the case under consideration, that a grantor who had no title and so conveyed to his grantee none, might nevertheless compel such grantee to convey to him the title purchased of another, so that the grantor might have good security for the payment of a mortgage which the grantee had given to him to secure the purchase-money when his deed conveyed nothing to the grantee.

It was found and not disputed, indeed it was alleged in the complaint, that at the time the plaintiff assumed to contract to sell the premises to Ramsdell, the former lease had expired

Opinion of the Court, per POTTER, J.

that there was no legal right in the lessee or assigns to compel a renewal. The renewal depended upon the option of the lessor, and that option depended upon such terms as to the amount of rent and character of the lessee as should suit the landlord, though preference was generally given the tenant in possession if he had the qualifications, and would assent to the terms dictated by the landlord as to the amount of rent and duration of the term of the new lease. If any duties spring from a contract in these circumstances, I should expect that one of them would be that the vendor who held the lease and must have known that it had expired, or nearly so, and had sold it for \$800, should himself have undertaken to have it renewed. But if the vendor was not disposed to do this he should at least have reminded his vendee who had no knowledge or means of knowledge at hand as to the termination of the lease, and should have induced the vendee to procure the renewal of the lease. But the plaintiff took no agreement from Ramsdell to do so, and waited until the defendant had obtained a new lease at rent more than double that of the old lease, and for a term of only ten years and then demanded that the defendant should assign it to him to secure the payment of the purchase-price.

I am not unaware that there is a class of cases, from which the appellant has collected a large number, where the renewal of a lease upon the same terms will be held for the benefit of a mortgagee of the first lease-hold estate, or where one partner has obtained a renewal in fraud of the rights of his co-partner under certain circumstances. The reason of the rule in the case of a mortgagee, is because in the mortgage it was covenanted or the law implied a covenant of title and thereafter the mortgagor would be estopped from claiming that the title he had, had expired. But these principles are not applicable to this case.

I am not unmindful in the expression of these views that in one respect the relation between vendor and vendee entering under a contract to convey is analogous to the relation between landlord and tenant and that is this, that neither the tenant

Statement of case.

nor such vendee will be heard to deny the title under which he entered into the possession of the premises.

That relation is based upon the principle of estoppel in the one case and in the other upon the principle that a party cannot rescind his contract without restoring what he has received under it, viz, possession.

When, however, either the tenant or such vendee has surrendered his possession he may contest his landlord's or his vendor's title in an action of ejectment by showing a better title derived from another or by any other legitimate defense.

But that principal is not involved in this case. The action is brought not to recover the possession of the premises contracted to be sold, but mainly to compel the defendant to assign to the plaintiff the rights which the defendant acquired under the new lease, to the end that plaintiff may hold and wield it as security for the payment of the purchase price of plaintiff's interest under the expired lease.

This is the equitable relief sought by the plaintiff in this action and I do not think he has shown himself entitled to it.

The judgment should be affirmed with costs.

All concur, except FOLLETT, Ch J., and HAIGHT, J., not sitting.

Judgment affirmed.

ANNIE M. HOLCOMB, Respondent, v. EMMA D. CAMPBELL,
Appellant.

Where a mortgagee agrees that a debt due by him to the mortgagor shall be applied in payment of the mortgage, the omission of the former to indorse the payment on the mortgage, does not alter the effect of the agreement as a payment, and an assignee of the mortgage takes it subject to the payment.

Neither a mortgagee nor his assignee derives "his title or interest from, through or under" the mortgagor within the meaning of the provision of the Code of Civil Procedure (§ 829) prohibiting a party from being "examined as a witness in his own behalf or interest * * * against * * * a person deriving his title or interest from, through or

Statement of case.

under a deceased person * * * concerning a personal transaction or communication between the witness and the deceased person.

Where therefore a husband and wife united in a mortgage of land owned by the former, both covenanting to pay the amount secured thereby, and the former died leaving a will by which he devised the lands to his wife, *held*, that the wife was not prohibited by said provision from testifying as against an assignee of the mortgage to certain transactions and agreements between her husband and the mortgagee to the effect that certain accounts found due her husband from the mortgagee on settlements of accounts between them should be applied as payments upon the mortgage.

Also, *held*, that her testimony as to what was said between her husband and the mortgagor in connection with each transaction, explaining the same, was competent.

Mem. of decision below (42 Hun, 396).

(Argued November 25, 1889, decided December 10, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made September 14, 1886, which affirmed a judgment in favor of plaintiff, entered upon the report of a referee.

This action was brought to restrain certain proceedings, by advertisement, for the foreclosure of a mortgage given by George P. Holcomb and the plaintiff, his wife, to Henry H. and Ephraim Alderman, on the 19th of April, 1869, to secure the payment of \$4,500 with annual interest.

Fifteen hundred dollars of the principal was payable on the 19th of April, 1870, and the balance in three equal annual installments. The mortgage contained a covenant on the part of both mortgagors to pay said sums. Said George P. Holcomb owned the premises covered by the mortgage from the date thereof until his death on September 3, 1883. By his last will and testament, which has been duly admitted to probate, the title passed to the plaintiff, who was in possession as owner when this action was commenced in November, 1884. On July 19, 1884, said bond and mortgage were assigned by the mortgagees to the defendant, who in August following commenced a foreclosure by advertisement, claiming that there was then due and unpaid the sum of \$1,109.97. The referee before whom the action

Statement of case.

was tried found that "on the 1st day of April, 1874, as then appeared from the payments which had been made and indorsed upon said bond and mortgage, there was due from the said George P. Holcomb to the said Aldermans the sum of \$644.50." He also found that subsequently said George P. Holcomb and the mortgagees settled certain accounts in relation to dealings had between them in lumber and bark, and that they agreed that there was due to the former from the latter the following sums, to wit:

In April, 1874, \$300; in September of the same year, \$349.50, for which a receipt was given containing an agreement on the part of said Aldermans to indorse the same upon the bond and mortgage; in August, 1875, the further sum of \$55, and in September, 1876, \$130 additional.

The referee also found that before said bond and mortgage were assigned to the defendant "the same had been paid, principal and interest, and more than paid."

Judgment was ordered and entered perpetually restraining said proceedings and requiring the bond to be surrendered to the plaintiff and the mortgage to be discharged of record.

R. E. Andrews and *Levi F. Longley* for appellant. The referee erred in allowing plaintiff to testify as to the general looking over of accounts and bills on several occasions. The agreement as sworn to by her did not constitute a payment under the statute of frauds, and a testimony of an accord and satisfaction was insufficient and void, because "a parol agreement cannot be received in evidence to prove a plea of accord and satisfaction to an action of debt on bond." (6 Wait's Act and Def., 423, *Stark v. Boswell*, 6 Hill, 406; *James v. Chalmers*, 6 N. Y. 209; *Seeley v. Engel*, 17 Barb. 530-535; *Smith v. Schanck*, 18 id. 344; *Worrall v. Parmlee*, 1 N. Y. 519; *Mattice v. Allen*, 3 Abb. Ct. App. 248-250; *Pitney v. G. F. Ins. Co.*, 65 N. Y. 6, 27; *Pratt v. Foote*, 9 id. 463, 466; *Therasson v. Peterson*, 4 Abb. Ct. App. Dec. 399; *Mitchell v. Hawley*, 4 Denio, 417; 1 Ch. Pl. 521; 2 id. 996; 2 Saund. Pl. & Ev. 712, 713, 717; *Dyer*, 25; 2 R. S. 353, §§ 11, 12,

Statement of case.

13; 1 R. L. of 1813, 517, § 5; *Panzerkiter v. Waydell*, 21 Hun, 161-162; *Davis v. Spencer*, 24 N. Y. 386; *Whitehouse v. Bk. of Cooperstown*, 48 id. 239; *Van Etten v. Trondden*, 3 T. & C. 607; *Yates v. Rosecrans*, 37 N. Y. 409; *E. F. A. v. Cuyler*, 75 id. 516; *Perrin v. Hotchkiss*, 2 T. & C. 370; 59 N. Y. 649; Code Civ. Pro. 397.) The defendant is estopped. (Herman on Estoppels, § 320; 6 Waite's Act. & Def. 694; *Mitchell v. Reed*, 9 Cal. 204.) This testimony was incompetent under the Code (§ 829); it purported to be a narration of transactions and communications at several interviews in the presence of the witness between her deceased husband, the maker of the mortgage, and Ephriam Alderman, then one of the holders thereof, which resulted each time in an agreement as to certain amounts due her husband from the holders of the mortgage and which were afterwards to be indorsed upon the mortgage. (Code Civ. Pro., § 829; Morrill on Comp. & Priv. of Wit. 31, 51; *Pope v. Allen*, 90 N. Y. 298; *Smith v. Cross*, 90 id. 549; *Holcomb v. Holcomb*, 95 id. 316; *Hood v. Teeter*, 10 Hun, 548; *Wilson v. Reynolds*, 31 id. 46; *Price v. Price*, 33 id. 69; 95 N. Y. 327; *In re Eysamon*, 113 id. 62; *Mills v. Davis*, id. 243.) It is only where improper evidence has been received, without objection, that a motion to strike out is necessary. (2 Rumsey's Pr. 303.)

James Lansing for respondent. The decision of a referee upon a question of fact made upon conflicting evidence, and approved by the General Term, concludes this court. (Code Civ. Proc., § 1337; *Marx v. McGlynn*, 88 N. Y. 369; *Haynes v. McDermott*, 91 id. 451.) The assignee of the bond and mortgage herein took it subject to all the equities existing between the original parties thereto, and she stands precisely in the shoes of her assignors. (*Bush v. Lathrop*, 22 N. Y. 535; *Trustee, etc., v. Wheeler*, 61 id. 114; *Bennett v. Bates*, 94 id. 354; *Davis v. Bechstein*, 69 id. 440; *Seligman v. Dudley*, 14 Hun, 186; *N. F. Ins. Co. v. McKay*, 21 N. Y. 194; *Andrews v. Gillespie*, 47 id. 487; *Briggs v. Langford*, 107 id. 680; *Prouty v. Price*, 50 Barb. 344; *Niagara*

Opinion of the Court, per VANN, J.

Bank v. Roosevelt, 9 Cow. 409.) Where a mortgagee or his assignee seeks to foreclose, by advertisement, a paid mortgage, or one against which there exists a set-off or counter-claim, or other defense, which renders it inequitable that it should be enforced or remain an apparent lien upon the lands of the mortgagor, the latter, or his grantee, has a right to restrain such foreclosure by injunction, and may have judgment requiring satisfaction of record, and the cancellation and delivery of said bond and mortgage. 1 (Story's Eq. Juris. § 705; *Shaw v. Dwight*, 27 N. Y. 244; *Sutherland v. Rose*, 47 Barb. 144; *Davis v. Spencer*, 24 N. Y. 386; *Morehouse v. S. Nat. Bk.* 98 N. Y. 503; *Hartley v. Tatham*, 2 Abb. Ct. App. Dec. 333; *Therasson v. Peterson*, 4 id. 396.) While an accord and satisfaction will not discharge a specialty debt; it is well settled that it will discharge damages arising from the breach of a specialty. (*Mitchell v. Hawley*, 4 Denio, 414; *Strang v. Holmes*, 2 Cow. 224; *Lawrence v. Barker*, 9 Daly, 140; *Allen v. Jaquish*, 21 Wend. 628.) The agreement was not one of sale or transfer and was not, therefore, within those provision of the statute of frauds. (*Brand v. Brand*, 49 Barb. 346; 48 N. Y. 675.) A party, cannot, upon a trial, take issue upon the allegations of fact, without reference to pleadings, and when beaten, seek to change the issue, or defeat a recovery upon grounds which might have been obviated on the trial. (*Salsbury v. Howe*, 87 N. Y. 123; *Knappe v. Simon*, 96 id. 292.) Declarations of an assignor or party which are a part of the *res gestae* are competent, and those of a party even when made in his own favor. (*Swift v. M. L. Ins. Co.*, 63 N. Y. 186; *Enos v. Tuttle*, 3 Conn. 250; *Wetmore v. Mell*, 1 Ohio, 26; *Roche v. Howell*, 6 Watts and Sarg. 350; *Smith v. Schanck*, 18 Barb. 344; *Jermain v. Denniston*, 6 N. Y. 276.)

VANN, J. As the question of fact arising between the parties was decided by the referee in favor of the plaintiff, upon a conflict of evidence, and the General Term has affirmed his decision, we are not permitted by the statute defining the

Opinion of the Court, per VANN, J.

powers of this court to review his determination in that regard. (Code Civ. Pro. § 1337; *Hynes v. McDermott*, 91 N. Y. 451.)

The appellant, however, claims that certain evidence given by the plaintiff, upon which the referee is presumed to have based his main findings of fact, was erroneously received and insists that the judgment against her should be reversed on this account. It is urged that the referee erred, both in admitting and in giving effect to the following testimony of the plaintiff when she was upon the stand as a witness in her own behalf:

"There was a general looking over of accounts and bills on several occasions; the first looking over was September 1, 1874, (when) \$349.50 was found due my husband to be indorsed on bond and mortgage; second interview was in April, 1875, \$300; third interview August, 1875, \$20 and \$35; September, 1876, \$130.20, all due my husband from Aldermans. I recollect the transaction of April, 1874, the sum then agreed upon was \$300; know George Holcomb's handwriting, signature to receipt; saw Ephraim Alderman make his mark; all these sums were to be indorsed upon the mortgage."

This testimony was given by the plaintiff in answer to a question by her counsel asking her to "state what was said and done at each of these interviews between your husband and the Aldermans, in which you did not participate." This was objected to by the defendant's attorney "the same as to the former questions; also on the further grounds that it calls for the statement, actions and declarations of third parties, and as being hearsay and in the absence of the defendant." The objection was overruled and the defendant excepted. The last question preceding was objected to as incompetent under section 829 of the Code of Civil Procedure, as well as upon other grounds.

This evidence was not the mere declaration, in his own behalf, of Holcomb, one of the mortgagors, nor the simple admission of Alderman, at the time one of the holders of the

Opinion of the Court, per VANN, J.

mortgage, but it was a business transaction between debtor and creditor, involving both acts and words. There was a general looking-over of accounts and bills and a balance was found due Mr. Holcomb, which it was agreed should be indorsed upon the mortgage. What was said during the interview, in the ordinary course of the business and as a necessary part thereof, was admissible as original evidence from its connection with the principal fact under investigation, to illustrate its character. As the acts of the parties at the time were competent, their statements made in connection with those acts, explaining the transaction, were also competent. (Greenleaf's Ev. § 108; 1 Phillips Ev. 231; Stephens Digest, 79.)

It is clear that a payment of money by the mortgagor to the mortgagee could be shown, even as against a subsequent holder of the mortgage, and it is equally clear that the declaration accompanying the act of payment that it was to be applied upon the mortgage could also be shown. "When words go with an act the nature of which is the subject of inquiry, they are taken as original evidence, because what is said at the time is legitimate, if not the best evidence of what was passing in the mind of the actor." (*Swift v. Mass. Mut. Life Ins. Co.* 63 N. Y. 186, 190.) "An agreement is an act done and thereby differs from a simple declaration. It is provable in like manner as a payment in money or property would be." (*Smith v. Schanck*, 18 Barb. 344, 346.)

The objection that this testimony was incompetent under section 829 of the Code does not appear to have been argued at the General Term. Disregarding the attempt to limit the evidence by excluding that part of the interview in which the witness might have participated, was the testimony competent whether she participated or not? Did she testify against a person who derived title through or under a deceased person? Did the defendant, the assignee of the mortgage, derive title from George P. Holcomb, the deceased mortgagor? What is the meaning of the phrase "a person deriving his title or interest from, through or under a deceased person" as used in the Code of Civil Procedure? (§ 829). The co-relative phrase

Opinion by the Court, per VANN, J.

in the corresponding section of the old Code was "heir at law, next of kin, assignee, legatee (or) devisee," no part of which would apply to the defendant, as she was not the heir at law, next of kin, assignee, legatee or devisee of George P. Holcomb, deceased. (Code of Procedure, § 399.) The expression "deriving his title or interest," when applied to the defendant, means the title to the bond and mortgage, because she had derived title to nothing else from any source. Did she derive her title to the bond and mortgage from George P. Holcomb, deceased?

In *Pope v. Allen*, (90 N. Y. 298) it was held that the owner of land derives his title thereto, within the meaning of the section in question, not only from his immediate grantor, but also through him, from remote grantors. By analogy it would follow that the assignee of a mortgage derives title thereto not only from his immediate assignor but also through him, from all former assignors. (*Smith v. Cross*, 90 N. Y. 549.) This does not meet the point under consideration, for assuming that the assignee of a mortgage derives title from all his predecessors in title, does he also derive title to the mortgage from the mortgagor? In other words, can any one, even the mortgagee, be said to derive title to the mortgage from the mortgagor? Assuming that a mortgage is a chose in action, giving no legal estate in land but simply a lien thereon to secure a debt, (*Trustees Union College v. Wheeler*, 61 N. Y. 88), it cannot be created without the joint action of both the mortgagor and the mortgagee. The one must execute and deliver and the other accept before the contract is complete and the mortgage in existence. There must also be a consideration furnished by the mortgagee or in his behalf. Until the minds of the mortgagor and the mortgagee meet, there is no mortgage. The mortgagee, therefore, does not derive title to the mortgage from the mortgagor, but holds it as a party to the contract, which was incomplete until it received his assent. As one of the creators of the instrument, he becomes the original possessor. Clearly the mortgagor can have no title to the mortgage, so-called, even after it is executed and ready for delivery, because it is not yet a mortgage, except

Opinion of the Court, per VANN, J.

in form and only becomes such in reality by the action of the mortgagee. The mortgagor does not transfer the title to the mortgage, because he never had it, but he aids in making a contract which when finished by the assent of the mortgagee becomes a mortgage, the title to which can be transferred by the latter only. This case does not impress us as coming within the spirit of the section, the general object of which was to prevent the survivor of an interview from giving a version that could not be contradicted. (Morrill on Comp. & Priv. of Witnesses, 8; *Pinney v. Orth*, 88 N. Y. 451.)

Where a husband and wife unite in giving a mortgage to two mortgagees and subsequently a payment thereon is arranged or made by the husband to one of the mortgagees, in the presence of the wife, the latter should not be prevented from testifying to what occurred, because her husband had died, when the mortgagees were still living and competent to give evidence. She would not be testifying against the successor in interest of a deceased person. If not disqualified as a witness against the mortgagees, she would not be, under the circumstances, against the assignee of the mortgage, as otherwise the mortgagees could disqualify her by their own act. We think, therefore, that the plaintiff was a competent witness in her own behalf, as against the defendant, to prove the settlement in question, even if it involved a personal communication between herself and her deceased husband.

It is contended that it should be assumed from the form of the question, which was not objected to on that ground, that the plaintiff did not participate in the interviews under consideration, but as to this we express no opinion.

There was no error in the conclusion of the referee that the mortgage was paid, although the mortgagees omitted to indorse the amounts found due to the mortgagor as payments on the mortgage, because "an agreement that a debt due or to become due shall be deemed *pro tanto* a payment on a debt due from the creditor operates as a satisfaction." (*Davis v. Spencer*, 24 N. Y. 386, 391.) The omission to indorse cannot affect the rights of the plaintiff. (*Bennett v. Bates*, 94 N. Y.

Statement of case.

354, 362.) If the evidence was inadmissible under the pleadings, the defendant failed to object thereto upon that ground, and also failed to move to dismiss the complaint because the proof was not within the allegations thereof. Under such circumstances, as was held in *Knapp v. Simon* (96 N. Y. 284, 292), this court "will consider the case upon the cause of action disclosed by the evidence, and disregard any objections to the sufficiency of the pleadings which were not made in the court below." (*Southwick v. First Nat. Bk.*, 84 N. Y. 420; *Cowling v. Altman*, 79 id. 167.)

We have examined the other questions to which our attention has been called by the learned counsel for the appellant, but find no error that should disturb the judgment which we think should be affirmed.

All concur.

Judgment affirmed.

118	55
122	216

ABRAHAM DAVIS, Respondent, v. PETER BOWE, late Sheriff, etc., Appellant.

If, when a judgment is paid to the attorney of the judgment-creditor the debtor is in custody, either actual or constructive, under an execution issued against his person upon such judgment, it is within the power of the attorney to authorize the sheriff to discharge him.

Where an order to discharge, signed by the attorney, is served upon the sheriff, it carries with it the presumption that it was duly authorized.

While this presumption may not be conclusive upon the sheriff, it requires some action on his part, either to return it or give notice that he requires something farther, or else to act upon it as sufficient.

Where, therefore, a judgment was paid and discharged of record, and the sheriff received without objection such an order to discharge the judgment debtor, who was out on bail and subsequently rearrested him.

Held, he was liable for false imprisonment.

Reported below (22 J. & S. 520).

(Argued December, 8, 1889; decided December 17, 1889.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made December 7, 1886, which affirmed a judgment in

Statement of case.

favor of the plaintiff, entered upon a verdict and affirmed an order denying a motion for a new trial.

This was an action for false imprisonment.

During the three years ending with December 31, 1882, the defendant was sheriff of the city and county of New York, and, as such, in August of that year received an execution issued against the person of the plaintiff, which, after reciting the recovery of a judgment in the Marine Court by one Gregg against the plaintiff and another for the sum of \$83.21, costs, commanded him to arrest the judgment-debtors and to commit them to the jail of said county until they paid said judgment, or were discharged according to law. In September, 1882; the defendant, by virtue of said execution, arrested the plaintiff, who furnished the usual bond and was admitted to the liberties of the jail. December 31, 1882, said judgment was duly satisfied of record and a notice, signed by the attorney who issued said execution, was delivered to the attorneys for the plaintiff, who on the same day caused it to be filed in the office of the defendant. The following is a copy of said notice, viz :

“MARINE COURT OF THE CITY OF NEW YORK.

MICHAEL SHUTER AND ABRAHAM DAVIS,

v.

ROBERT GREGG.

“*To the Sheriff of the city and county of New York :*

“You will please discharge from custody the judgment-debtor, Abraham Davis, by virtue of the execution herein.

“Yours, etc.,

“T. CORNING McKENNIE,

“*Defendant's Attorney.*”

Indorsed : “Received December 13, 1882, 12.53 P. M.”

The witness who delivered the notice to one of the deputies of the defendant, in the sheriff's office, testified that he gave the paper to the deputy and asked him “if that was all right” and was answered that it was. He also testified that he

Statement of case.

left the paper there, and, in substance, that this was all that took place.

The term of the defendant as sheriff expired on the thirty-first of December, 1882, and on the sixth of January, 1883, but within the time allowed by law for the delivery to the incoming sheriff of jails, prisoners, process, etc., the defendant indorsed upon the bond given by the plaintiff on his admission to the jail liberties, among other things, the following: "Marine Court. Robert C. Gregg v. Abraham Davis. * * Abraham Davis, the above-named defendant, is hereby remanded to jail," and signed the same as late sheriff.

This paper, called "a remand order," was delivered by the defendant to a deputy and the plaintiff was arrested by virtue thereof on Saturday, January 6, 1883, after 10 o'clock at night. He was taken through the streets to the door of the Ludlow street jail when he was allowed to go until the following Monday morning upon the payment of ten dollars to the arresting officer. On Monday morning he went to the sheriff's office and was informed that if he did not furnish bondsmen by twelve o'clock he would be arrested again, but upon showing that the judgment was satisfied was told that he could go home. The remand order, as the defendant testified, was issued for the purpose "of transfer to his successor," after notice by mail to prisoners upon the limits to appear with bondsmen and give bail to the new sheriff. It did not appear that the plaintiff received a notice of any kind. During the trial the counsel for the plaintiff stated that he did not claim that the defendant had no right to arrest prisoners, who were upon the limits, in order to compel them to give bonds to the new sheriff, provided the executions were in force and the judgments unsatisfied.

Malcom Graham for appellants. The so-called discharge from arrest is worthless. (*Smith v. Egginton*, 7 Ad. & El. 167; *Jackson v. Bartlett*, 8 Johns. 361; *Kellogg v. Gilbert*, 10 id. 220; *Simonton v. Barrett*, 21 Wend. 362; *Crary v. Turner*, 6 Johns. 51; *Connop v. Challis*, 2 Exch. 484; *Kar-SICKELS*—VOL. LXXIII. 8

Statement of case.

son v. People, 44 Barb. 347; *Poucher v. Holley*, 3 Wend. 184; *Powers v. Wilson*, 7 Cow. 274; *Lathrop v. Briggs*, 8 id. 171; *Ransom v. Keyes*, 9 id. 128; *Smith v. Sheriffs*, Id. 399; *Hayes v. Bowe*, 65 How. 347; *Goodrich v. McDonald*, 112 N. Y. 157; *Martin v. Kanouse*, 11 How. Pr. 567; *Lockport v. Hunting*, 39 Hun, 221; *Wheaton v. Newcombe*, 16 J. & S. 215; *Haight v. Holcombe*, 16 How. Pr. 160; *Starin v. Mayor, etc.*, 106 N. Y. 82; *People v. Steuben Com. Pleas*, 12 Wend. 200; *Cross on Liens*, 220; *Chappell v. Dunn*, 21 Barb. 17; *Cowell v. Simpson*, 16 Ves. 275; *Lambert v. Buckmaster*, 2 B. & C. 616; *Pyne v. Earle*, 8 Tenn. Rep. 407; *Barber v. St. Quintin*, 12 M. & W. 441; *Langley v. Headland*, 19 C. & B. [N. S.] 42; *Martin v. Francis*, 2 B. & Ald. 402; *Marr v. Smith*, 4 id. 466; *Graves v. Eads*, 5 Taunt. 429; *Prentiss v. Livingston*, 60 How. Pr. 380.) The acts of Ward and Fitch did not make the sheriff a *tort feasor ab initio*. (*Shoeland v. Gorett*, 5 B. & C. 485; *Smith v. Eggington*, 7 Ad. & El. 167; *Gates v. Lounsbury*, 20 Johns. 427; *Adams v. Rivers*, 11 Barb. 390; *Crowder v. Lang*, 8 Barn. & C. 598.)

Henry McCloskey for respondent. The notice signed by the attorney discharged the prisoner. (*Parker v. Spier*, 62 How. Pr. 394; *McGregor v. Comstock*, 28 N. Y. 240; *Rooney v. S. A. R. R. Co.*, 18 id. 368; *Trustall v. Winston*, 31 Hun, 219; *Shackelton v. Hart*, 20 How. Pr. 39; *Kipp v. Rapp*, Daily Reg., June 26, 1885; *Leshner v. Roessner*, 3 Hun, 217; *Haight v. Holcombe*, 16 How. Pr. 160; *Marshall v. Meech*, 51 N. Y. 140; *Rasquin v. Stage Co.*, 12 Abb. 325; *Dietz v. McCallum*, 44 How. 494; *Wright v. Fleming*, 10 Wkly. Dig. 450; *Ennis v. Curry*, 22 Hun, 584; Code Civ. Pro., §§ 1260, 1494.) The extortion of money made the sheriff a *tort feasor ab initio*. (*Carpenter's Case*, 8 Coke, 146; *Holly v. Mix*, 3 Wend. 350; *McIntyre v. Trumbull*, 7 Johns. 35; *Waterbury v. Westervelt*, 9 N. Y. 598; *Arteaga v. Connor*, 88 id. 410.) The damages were not excessive. (*Blum v. Higgins*, 2 Abb. Pr. 104.)

Opinion of the Court, per VANN, J.

VANN, J. Upon the trial of this action the court in its charge to the jury said: "The plaintiff offered evidence to show that some time before the re-arrest, a notice was given that you have heard read here, signed by the attorney for the opposite party, directing the sheriff to discharge the plaintiff from arrest under the execution. I will hold here, for the purposes of this action, that that notice was sufficient to entitle the plaintiff to a discharge, providing that such notice was left with the sheriff and not withdrawn, and that is the first question that you are to determine here." The defendant excepted "to so much of the charge as stated * * * that the notice was sufficient to entitle the plaintiff to a discharge unless withdrawn."

The rest of the charge does not appear in the record and hence it will be presumed that all questions of fact, aside from the one to which the exception relates, were properly submitted to the jury and that they decided them in favor of the plaintiff. This exception raises the question whether the notice signed by the attorney who issued the execution was, under all the circumstances, effective as a discharge of the prisoner. The defendant insists that an attorney has no power, by employment as such, to discharge a defendant taken in execution. (*Jackson v. Bartlett*, 8 J. R. 361; *Kellogg v. Gilbert*, 10 id. 220; *Simonton v. Barrell*, 21 Wend. 362.) On the other hand the plaintiff argues that, as the judgment was for costs only, the attorney had absolute control of the remedies given for its collection; and that as the sheriff had notice of the fact through the recitals in the execution, he should have recognized the paper as a valid discharge. (*Tunstall v. Winton*, 31 Hun, 219; *Marshall v. Meech*, 51 N. Y. 140; *Shackleton v. Hart*, 20 How. Pr. 39.)

Without passing upon these questions, we are of the opinion that the act of the attorney in directing a discharge could not be disregarded by the defendant, as in the absence of suggestive or significant circumstances, he had no right to presume that an officer of the court had acted in violation of his duty. It is provided by section 1260 of the Code of Civil Procedure that the

Opinion of the Court, per VANN, J;

docket of a judgment must be cancelled and discharged by the clerk in whose office the judgment roll is filed, upon filing with him a satisfaction piece describing the judgment and executed, if made within two years after the filing of the judgment roll, "by the attorney of record of the party." Thus the power of the attorney to acknowledge satisfaction is clear and the duty of the clerk to recognize it by cancelling the judgment, as docketed, imperative. Assuming that, even in the case of a judgment for costs only, the attorney has no right, as between himself and his client, (*Beers v. Hendrickson*, 45 N. Y. 665), without express authority, to issue a satisfaction piece unless the judgment is paid, that does not affect the duty of the clerk, at least in the absence of notice. The command of the statute is that the docket of the judgment *must* be cancelled and discharged by him. Service upon the sheriff of a certified copy of a discharge by the clerk of a judgment would be notice to him that his power to collect an execution issued upon such judgment was at an end. Less formal notice while not conclusive upon him might charge him with the duty of making inquiry before taking further action and he would be entitled to a reasonable time for that purpose.

If when a judgment is paid to the attorney, the judgment debtor is in custody, either actual or constructive, under an execution issued against his person upon such judgment, it is manifestly within the power of the attorney to authorize the sheriff to discharge him. The power to issue a satisfaction piece implies a power to discharge and while neither power may be exercised, as between the attorney and his client, to the injury of the latter, third persons, in the absence of notice to the contrary, have the right to presume that the power, when exercised, was authorized by the client, either expressly, or by virtue of the original retainer. When, therefore, the direction to discharge was served upon the sheriff, on the occasion in question, the presumption arose that it was duly authorized, because it was within the apparent powers of the attorney. Moreover, if an attorney does an act, which would be a violation of his duty, unless a certain condition had first

Statement of case.

been performed, it will be presumed that such condition was performed. (2 Best on Evidence, [Wood's ed.] 641-645; *Hamilton v. Wright*, 37 N. Y. 502; *Corning v. Southland*, 3 Hill 552.

It follows that when the order to discharge the plaintiff from custody by virtue of the execution against his person, reached the sheriff, it was accompanied with the presumption of lawful authority. While this presumption may not have been conclusive upon the defendant, it required some action on his part. Having received the discharge without objection, he was bound to return it, or give notice that he required something further or else to act upon it as sufficient. He retained it for twenty-four days without notice or question and then treated it as a nullity. If he was in doubt as to the authority of the attorney, it was his duty under the circumstances to say so. If he wanted further proof, he should have demanded it. If he had any reason to question the sufficiency of the discharge, or for refusing to comply with it, he should have made it known, so that the plaintiff would have had an opportunity to remove the objection. But he said nothing and did nothing, leaving it to be inferred that he was satisfied in all respects. Therefore, when he caused the plaintiff to be re-arrested, under the facts as the jury is presumed to have found them, he acted at his peril and must suffer the consequences.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

THE BUFFALO CEMETERY ASSOCIATION, Appellant, v. THE CITY
OF BUFFALO, Respondent.

A special statute providing for a particular case, as applicable to a particular locality, is not repealed by a statute general in its terms and application, unless the intention of the legislature to repeal or alter the special law is manifest, although the terms of the general act would, if strictly construed, but for the special law, include the case or cases provided for by it.

118	61
163	372
118	61
165	279

Statement of case.

Accordingly, *held*, that as the right to make assessments upon the lands of cemetery associations in the city of Buffalo, is provided for by the local laws applicable to that city alone (chap. 519, Laws of 1870; chap. 154, Laws of 1871), which authorize an assessment upon such lands for grading an adjoining street, those provisions were not repealed by the act of 1879 (chap. 310, Laws of 1879), which declares that no land actually used for cemetery purposes shall be sold under execution for any tax or assessment; and that such an assessment was valid.

Also, *held*, the fact that said act of 1879 especially excludes the city of Rochester, did not authorize the inference of an intent to repeal the said acts applicable to Buffalo.

Reported below (43 Hun, 127).

(Argued November 27, 1889; decided December 10, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made January 25, 1887, which affirmed a judgment in favor of defendant entered on the decision of the court on trial at Special Term.

This action was brought to have a certain assessment imposed by the defendant upon the lands of the plaintiff, for the grading of a street adjoining it's property declared to be void, and the collection thereof perpetually restrained.

The trial court adjudged the assessment valid and dismissed the complaint upon the merits.

Edmund J. Plumley for appellant. By the provisions of chapter 154 of the Laws of 1871, all cemetery lands in the city of Buffalo were made subject to the provisions of section 10 of the "Act to incorporate cemetery associations," passed April 27, 1847. (Laws of 1871, chap. 154, §§ 2, 3; *Buffalo City Cemetery v. City of Buffalo*, 46 N. Y. 506; *Heckman v. Pinkney*, 81 id. 215; *People v. G. & S. T. Co.*, 98 id. 78; *People v. Jaehne*, 103 id. 195.) The acts of 1870 and 1871, referred to under the last point, in no way changed or affected the previously existing provisions of law applicable to assessments upon cemetery lands in the city of Buffalo, as interpreted and construed by the Court of Appeals. (*Buffalo City Cemetery v. Buffalo*, 46 N. Y. 506; *Van Denbuhr v. Village of Greenbush*, 66 id. 1; *People v. G. & S. T. Co.*, 98

Statement of case.

id. 67; *Stradling v. Morgan*, 1 Plowd. 199, 204; *People v. Jaehne*, 103 N. Y. 182.) The defendant had no power to make the assessment in question upon plaintiff's land. (Session Laws, 1879, chap. 310; *In re S. A. M. E. Church*, 66 N. Y. 398, 400; *In re Cram*, 69 id. 461; *State v. Newark*, 36 N. J. 478; *Howard College v. Alderman, etc.*, 104 Mass. 470; Laws of 1847, § 10; Laws of 1854, chap. 234, § 9; *Pratt v. Munson*, 84 N. Y. 588; *People v. G. & S. T. Co.* 98 N. Y. 78; *People v. Jaehne*, 103 id. 195; *Horton v. Cantwell*, 108 id. 263-4; *People v. O'Neil* 109 id. 251; *Anderson v. Anderson*, 112 id. 110-111-112; *United States v. Claflin* 97 U. S. 546.) It is evident from section 3 of chap. 310 of the act of 1879, that the legislature intended that the provisions of the act should apply to lands in all localities of the State except to those held by the city of Rochester. (*Tinkham v. Tapscott*, 17 N. Y. 152, 153; *People v. Lacombe*, 99 id. 49; Cooley on Tax'n. [2d ed.] 264-265.) The limitation contained in section 9 of chapter 275 of the Laws of 1880, requiring an action to be brought within one year after the delivery of the assessment-roll to the treasurer, has no application to this case, the making of the assessment being prohibited. (*H. S. F. Ass'n v. Mayor, etc.* 47 Hun, 446, 451; *Nat. Bank v. Elmira*, 53 N. Y. 49, 54, 58-9; *Jex v. Mayor, etc.*, 103 id. 541; *Ferguson v. Crawford*, 70 N. Y. 253; *Craig v. Andes*, 93 id. 411; *Jackson v. Andrews*, 7 Wend. 152; *Livingston v. P. I. Co.* 9 id. 511; *In re S. A. M. E. Church*, 66 N. Y. 400; *In re Cram*. 69 id. 461; *H. S. F. Ass. v. Mayor, etc.* 4 Hun, 451; *Schoener v. Lissauer*, 107 N. Y. 116-17; *Miner v. Beekman*, 50 id. 343; *Strang v. Cook*, 47 Hun, 46; *People ex rel. v. Haupt*, 104 N. Y. 381; *People ex rel. v. Hicks*, 105 id. 202.) The limitation clause, in so far as it may be said to have been intended to operate as a bar to the maintenance of this action is obnoxious to the clause of the Constitution which prohibits the taking of a person's property without due process of law. (Constitution, N. Y. art. 1, § 6.) Under defendant's charter, an action in equity is the proper remedy. (Laws of 1880, chap. 275, 413, §§ 8, 9; *Rumsey v. Buffalo*, 97 N. Y. 114; *T. G.*

Statement of case.

Sem. v. Cramer, 98 id. 121; *Stewart v. Cryslar*, 100 id. 378.) "The power to impose a tax on real estate and to sell it when there is a failure to pay the tax is high prerogative, and should never be exercised where the right is doubtful." (*Jex v. Mayor, etc.*, 103 N. Y. 536; *Beatty v. Knowler*, 4 Pet. 170; *Wright v. Briggs*, 2 Hill, 76; *Sharp v. Spier*, 4 id. 84-86; *O'Donnell v. McIntyre*, 37 Hun, 618; *Brevoort v. Brooklyn*, 89 N. Y. 133.)

Frank C. Laughlin for respondent. The general rule of law is that all property shall bear its just proportion of the burden of taxation; all property is subject to taxation and the sovereign power cannot be held to have relinquished its right to tax, except by clear and unmistakable language, and the burden of establishing the exemption is on the party claiming it. (Cooley on Tax. [2d ed.] 203, 204, 205, 207; Desty on Taxation, 132, 136.) The charter of the plaintiff does not exempt its lands from the assessment complained of. (Laws of 1870, chap. 519, §§ 7, 10; *Take v. Trustees, etc.*, 4 Denio, 520; *Baldwin v. City of Oswego*, 2 Keyes, 132; *McCullough v. Mayor, etc.*, 23 Wend. 458; *B. C. Cemetery v. City of Buffalo*, 46 N. Y. 506; *Richardson v. City of Brooklyn*, 34 Barb. 569; *Baker v. City of Utica*, 19 N. Y. 326; Laws of 1847, chap. 133, § 10.) The lands of the plaintiff, lying within the limits of the city of Buffalo, are subject to the provision of the charter of the city of Buffalo which provides that the expense of paving streets shall be defrayed by local assessments and that no lands in said city shall be exempt therefrom. Laws of 1870, chap. 519, § 21; *People v. O'Brien*, 38 N. Y. 193; *People v. Sup'rs*, 43 id. 10; *Huber v. People*, 49 id. 132; Laws of 1870, chap. 519, §§ 7, 10, 21; *Van Denbury v. Village of Greenbush*, 66 N. Y. 1; *Whipple v. Christian*, 80 id. 523; *McKenna v. Edmanstone*, 91 id. 231; *Fitzgerald v. Chapneys*, 2 John. & H. 31; *Purnell v. W. N. W. W. Co.* 10 C. B. [N. S.] 575; *Matter of Goddard*, 94 N. Y. 544; *Matter of Evergreens*, 47 id. 216; *Rounds v. Waymuth Burrough*, 81 Pa. 395; *Wood v. Com'rs*, 58 Cal. 561; *City of Harrisburgh v. Sheck*, 104

Opinion of the Court, per PARKER, J.

Pa. 53; *People ex rel v. Sup'rs.* 40 Hun, 353; *In re Knaust*, 101 N. Y. 183; *Burnham v. Onderdonk*, 41 id. 425; *Mc Vey v. Mc Vey*, 51 Mo. 406; *Covington v. City of East St. Louis*, 78 Ill. 548; *In re Cruger*, 89 N. Y. 401; *Mark v. State*, 97 id. 572; *People v. Bd. of Sup'rs.* 103 id. 547; 19 Viner's Abridg. 525; *McCarter v. O. A. Soc.*, 9 Cow. 437; *Williams v. Potter*, 2 Barb. 316; *Fitzgerald v. Chapneys*, 2 Johns. & H. 31; *Whipple v. Christian*, 80 N. Y. 523; *McKenna v. Edmanstone*, 91 id. 231; 4 N. Y. S. R. 229; *Burnham v. Onderdonk*, 41 N. Y. 425; Laws of 1811, chap. 154; *People v. O'Brien*, 38 N. Y. 193; *In re N. Y. El. R. R. Co.* 70 id. 327-349; *People v. Super.* 43 id. 10; *Huber v. People*, 49 id. 132.) Assuming that the lands of the plaintiff were exempt from assessment, that furnishes no ground for a suit in equity. (*Wells v. City of Buffalo*, 80 N. Y. 253; *Phelps v. Mayor, etc.*, 20 N. Y. S. R. 238; 112 N. Y. 216; *Diefeithaler v. Mayor, etc.*, 19 N. Y. S. R. 126; Laws of 1870, chap. 517. §§ 24, 29, 36.)

PARKER, J. The conclusion of the courts below as to the validity of the assessment in question is in accord with the result at which we have arrived. In the opinions written at both Special Term and the General Term, the proposition involved was so thoroughly considered as to require but little discussion in this court. It is not questioned but that prior to the passage of chapter 310 of the Laws of 1879, the local authorities possessed the power of making an assessment for grading and paving adjoining plaintiff's premises. It was so determined by this court in the case of the *Buffalo City Cemetery v. City of Buffalo*, (46 N. Y. 506). But the act referred to is a general act and declares that no land actually used for cemetery purposes shall be sold under execution for any tax or assessment. If that act be applicable to lands owned and used for cemetery purposes within the limits of the city of Buffalo, the assessment in question is unlawful. The act of 1879 did not in terms repeal other statutes then existing. Whether it did repeal by implication the local and special acts authorizing the assessment in question is therefore one of

Opinion of the Court, per PARKER, J.

legislative intent. It is a rule of construction that a special statute providing for a particular case, or applicable to a particular locality, is not repealed by a statute general in its terms and application unless the intention of the legislature to repeal or alter the special law is manifest, although the terms of the general act would, taken strictly and but for the special law, include the case or cases provided for by it. (*Van Denburgh v. Village of Greenbush*, 66 N. Y. 1; *Whipple v. Christian*, 80 id. 525.)

A brief reference to the statutes discloses that at the time of the passage of the act referred to, an assessment of the character of the one in question was authorized by local statutes relating to lands within the limits of the city of Buffalo.

The plaintiff was incorporated pursuant to chapter 234 of the Laws of 1854, entitled "An act to incorporate The Buffalo Cemetery Association." By chapter 519 of the Laws of 1870, the charter of the city of Buffalo was revised, and therein it was provided that "no lands in the city shall be exempt from local assessments, any statute to the contrary notwithstanding."

Thereafter was enacted chapter 154 of the Laws of 1871, entitled "An act to amend the charter of The Buffalo City Cemetery Association," and to restore the exemptions of cemeteries in said city from local assessment." The second section provided that the lands of cemetery associations in the city of Buffalo shall be exempt from taxes, rates and assessments to the extent provided in section 10 of "The act to incorporate cemetery associations," passed April 27, 1847. The third section provided that such exemptions shall not apply to assessments for grading or paving such parts of streets or sidewalks as shall be in front of and bounded upon the lands of said cemetery associations.

It is apparent, therefore, that the right to make an assessment against the lands of cemetery associations within the limits of the city of Buffalo, was provided by local laws applicable to that city alone. Therefore, within the rule laid down in the cases cited *supra*, the legislature will not be pre-

Statement of case.

sumed to have intended their repeal by the enactment of chapter 310 of the Laws of 1879, unless such intention is manifest.

Our attention is called to but one feature of the enactment from which it is claimed an inference of an intention to repeal the local act can be drawn. It is claimed that such intent is inferable, from the fact that the city of Rochester is expressly excluded from its provisions. We think *McKenna v. Edmundstone* (91 N. Y. 231), is authority for denying that the exception affords an inference of such intention.

The judgment should be affirmed.

All concur, except BRADLEY and HAIGHT, JJ., not sitting.
Judgment affirmed.

WILHELMINA HAACK, Appellant, v. JOHN WEICKEN, et al., as
Executors, etc., et al., Respondents.

H. died seized of certain real estate and leaving four children, of whom plaintiff is one. They entered into an agreement for partitioning the land among themselves, by the terms of which plaintiff was to take her interest in a lot valued at \$20,000. This was to be conveyed by the owners to J., one of their number, who was to convey the same to plaintiff and her husband as tenants in common, upon payment by the husband of \$10,000 to a sister of the plaintiff. J. received a conveyance from his co-tenants in common, and directed the scrivener to draw a deed, from him to plaintiff and husband, as agreed, but the scrivener, by the direction of the husband, made out the deed to him alone; this was executed by J. without any knowledge of the variance from his instructions and with the intention on his part of carrying out the agreement; the change was not discovered by him or plaintiff until after the death of the husband, and she received no consideration for the transfer of her interest to him. In an action to have said deed reformed by inserting plaintiff's name as a grantee, *held*, that J., in taking title for purposes of the agreement, did so as trustee, and had no authority to convey, otherwise than as stipulated; that as to him and plaintiff, there was a mutual mistake of fact, which entitled her to the relief sought, as the portion of the agreement requiring him to convey to the husband an undivided half was independent of that requiring the conveyance to plaintiff, and gave the brother no power, right or authority to change, alter, or modify the agreement to convey to her; that plain-

Statement of case.

tiff's husband occupying that confidential relation to her, and, having obtained the conveyance as he did, the burden was cast upon him and his successors in title, of showing that the conveyance was free from fraud or mistake.

Also, *held*, that plaintiff's rights would not be affected if it appeared that her husband acted for her as her agent; in which case, having procured the conveyance of her interest to himself without her knowledge or consent, she was entitled to have it adjudged that he took title in trust for her. (1 R. S. 728, §§ 51, 52).

Plaintiff's husband left a will by which he devised to her certain real estate which was worth about \$8,000 above incumbrances, and bequeathed her \$10,000. in cash, in lieu of dower. After various legacies he gave his residuary estate to beneficiaries named. The personal estate was more than enough to pay the debts and legacies. Plaintiff accepted the provision made for her in the will; the court found that this acceptance amounted to an election under the will and precluded her from setting up any legal or equitable claim of her own to the real estate in suit. *Held*, error; that the residuary clause only covered property which belonged to the testator, and no intent could be inferred to devise the real estate which he knew equitably belonged to his wife; and so the provisions of the will were not inconsistent with plaintiff's claim.

Haack v. Weicken (42 Hun, 486), reversed.

(Argued October 22, 1889; decided December 17, 1889.)

APPEAL from judgment of the General Term of the Supreme Court of the first judicial department, entered upon an order made December 31, 1886, which affirmed a judgment in favor of defendants, entered upon a decision of the court on trial at Special Term.

The nature of the action and the facts are sufficiently stated in the opinion.

Matthew Hale for appellant. The trial court erred in its conclusion that the plaintiff had not any right, title or interest in the lands and premises in question, and that said lands and premises vested in the residuary devisees of Heinrich A. Haack. (1 Wash. on Real Property, 176, 179; 4 Kent's Com. 39; *Stow v. Tift*, 15 Johns. 458; *Hazelton v. Lesure*, 9 Allen, 24; *King v. Stetson*, 11 id. 407; *Stehlin v. Golding*, 15 N. Y. S. R. 814; *Boyd v. De La Montagnie*, 73 N. Y. 498, 502; 1 R. S. 728, §§ 51, 53; *Day v. Roth*, 18 N. Y. 448; *Lounsbury v.*

Statement of case.

Purdy, Id. 515; *Siemon v. Schurck*, 29 id. 598; *Fairchild v. Fairchild*, 64 id. 471, 476.) The court below, both at General and Special Term, erred in holding that plaintiff was precluded from asserting her equitable interest in the premises by reason of her accepting the benefit conferred upon her by the will. *Havens v. Sackett*, 15 N. Y. 365, 369; *Clementson v. Ganby*, 1 Kee, 309; 1 Jarman on Wills, 451, 452; *Dummer v. Pitcher*, 2 Myl. & K. 202; *Havens v. Sackett*, 15 N. Y., 365, 370; *Pennsylvania Co. v. Stokes*, 61 Pa. St. 136; *Gregory v. Gates*, 30 Gratt. 83; *Ditch v. Sennott*, 117 Ill. 363; 2 R. S. 57, §§ 4, 5; *Beck v. McGillis*, 9 Barb. 35; 1 Jarman on Wills, 453, 454; 1 Washburn on Real Property, 676; *McDermott v. French*, 15 N. J. Eq. 81; 4 Kent's Com. 363; *Havens v. Sackett*, 15 N. Y. 365; *Ditch v. Sennott*, 117 Ill. 362; *Church v. Kemble*, 5 Sim. 525; 2 Story's Eq. Juris., §§ 1086, 1089, 1097, 1098; *Blake v. Bunbury*, 1 Ves. 515; *Ranclylffe v. Parkyns*, 6 Dow. 149, 169, 185; Kerr on Fraud, 453; *Wells v. Robinson*, 13 Cal. 133, 142; *Pusey v. Desbouvrie*, 3 P. Wms. 315 *Hindley v. Hindley*, 29 Hun. 318.

Rudolph Rabe for respondent. The plaintiff's exception to the finding of fact that no mistake was made in omitting her name, as one of the grantees, from the conveyance sought to be reformed, is not tenable. (Bispham on Eq. [4th ed.], 240; *Mead v. W. F. Ins. Co.*, 64 N. Y. 453, 455.) The plaintiff's claim is also subject to the further objection that it is barred by invoking against it the equitable doctrine of "Election." (*Thebusson v. Woodford*, 13 Ves. 226; 1 Russ. & Mylm, 254; 1 Dow, 249; *Ker v. Wanchope*, 1 Bligh, 21, 22; *Tibbitts v. Tibbitts*, 19 Ves. 663; *Noys v. Mordaunt*, 2 Vern. 581; *Havens v. Sackett*, 15 N. Y. 369; Pomeroy on Eq. Juris. 509, § 466; *Waters v. Howard*, 1 Md. Ch. 112.) The exception of plaintiff to the refusal of the court to find "that by reason of fraud the plaintiff's name was omitted as one of the grantees in the deed in question should not be sustained." (Bigelow on Frauds, 450; *Faure v. Martin*, 7 N. Y. 210, 218; *Bailey v.*

Opinion of the Court, per HAIGHT, J.

Ryder, 10 id. 363; *Chautauqua Bank v. White*, 6 id. 236; 39 Cal. 532.

HAIGHT J. This action was brought for the reformation of a deed executed by John Albert Ropke to Heinrich A. Haack, dated the 6th day of October, 1879, conveying certain real estate in the city of New York, by inserting the name of the plaintiff as one of the grantees therein and adjudging her to be the owner of one undivided half thereof.

The trial court has found as facts that William Ropke died seized of two parcels of real estate, one situated in the city of Brooklyn, and the other in the city of New York, each valued at the sum of \$20,000; that he left him surviving three daughters and one son, of which the plaintiff was one, who had become vested as tenants in common of the real estate so left by him; that on or about the 6th day of October, 1879, they entered into an agreement to the effect that the lands situated in the city of Brooklyn should be conveyed to the plaintiff's brother, John Ropke, upon payment by him of the sum of \$10,000 to one of the plaintiff's sisters; and that the lands situated in the city of New York should be conveyed to him in order that the same should be conveyed by him to the plaintiff and her husband, Heinrich A. Haack, upon payment by her husband of the sum of \$10,000 to the other sister; that the plaintiff's interest in the estate should remain in the New York property; that instruments in writing intended to execute and consummate the agreement were executed and delivered, and the sums of money so agreed were paid by John Ropke and the plaintiff's husband respectively; that the deed executed by John A. Ropke of the New York property, pursuant to the agreement, ran to Heinrich A. Haack, the plaintiff's husband, as the sole grantee; and that the plaintiff received no consideration whatever for conveying her interest in the estate of her father to her husband; that she did not know of it until after the death of her husband and until the month of September, 1883, but had always understood and believed that the title had been taken in the name of herself and her husband, pursuant to the agreement.

Opinion of the Court, per HAIGHT, J.

The trial court further found as a fact that no mistake was made in omitting from the deed mentioned, the name of the plaintiff as one of the grantees or parties of the second part; and, as conclusions of law, that it was valid and effectual as against the plaintiff and conveyed the entire title to her husband.

Exceptions were taken to the last finding of fact as well as to the conclusions of law.

There is an apparent conflict in the finding of fact to the effect that there was no mistake in omitting from the deed the name of the plaintiff, with the findings that precede it. It is our duty to see if they can be reconciled. (*Green v. Roworth*, 113 N. Y. 462.) We have, therefore, examined the case with some care for the purpose of determining what was intended by the trial court in making this finding. Upon referring to the requests to find which were submitted by the plaintiff, the trial court repeated the finding of the partition agreement of the children of William Ropke, and that the conveyance was to be made by them to John Ropke, and that he was to convey the New York property to the plaintiff and her husband upon the payment by the husband of the sum of \$10,000 to one of the sisters, "and that the plaintiff's interest in the said estate should remain in said New York property," and that the instruments in writing intended to execute and consummate the agreement were executed and delivered, etc. Thus finding that so far as John Ropke was concerned that he executed the deed with the intention and for the purpose of carrying out the agreement. Upon referring to the evidence we find that there was no dispute about the agreement; that all of the children understood it alike; that John Ropke understood that he was to convey to the plaintiff and to her husband, and that the plaintiff's \$10,000 was to stay in the property along with her husband, and that in executing the deed he did not stop to read it. The agreement was so understood by Mr. Morgan, the executor of William Ropke, and he appears to have instructed Mr. Bradshaw to draw the deeds in conformity therewith. It seems that Mr. Bradshaw so under-

Opinion of the Court, per HAIGHT, J.

stood the agreement, but he omitted the name of Mrs. Haack from the deed because her husband stated to him that "he wanted that portion to his wife fixed so it vested in him." He testified, however, that Mrs. Haack was not present, and that he did not consult her to see whether the arrangement was according to her wishes; that he did not ask any questions, but thought that Mr. Haack was a pretty clear-headed fellow, and was taking good care of himself to vest himself with the property. The trial court in its opinion restates the agreement as made between the children of Ropke, and that the plaintiff was to take title to the New York property with her husband, and then refers to the direction of the plaintiff's husband to the conveyancer to draw the deed so that the property would vest in him, and upon this fact appears to have based the conclusion that the idea of a mistake in the transaction could not be upheld. So that, as we understand, the intention and meaning of the trial court in finding that there was no mistake in omitting from the deed the name of the plaintiff, means that there was no mistake so far as the plaintiff's husband was concerned. This construction removes the conflict that otherwise would exist between the findings of fact as made and brings them into harmony with the testimony given.

It next becomes important to consider the interest of Ropke, the grantor, and his relation to the parties. As we have seen, he was the brother of the plaintiff, and one of the four tenants in common to the New York and Brooklyn property, of which his father had died seized. They had agreed upon a partition of the property between them. The sisters had joined in a deed to him with the understanding and agreement that he was to convey the New York property to the plaintiff and her husband upon the payment by the husband of \$10,000 to one of the sisters; that the plaintiff's interest was to remain in the New York property. The plaintiff, as one of the four children of William Ropke, was seized of a one-fourth interest of the real estate in New York and Brooklyn. Under the partition agreement she was to convey her interest in the Brooklyn property to her brother, and her entire interest in the real

Opinion of the Court, per HAIGHT, J.

estate was to vest in the New York property, which would make her interest in that property an undivided one-half. John Ropke in taking the title to the New York property under the agreement to convey, became merely a trustee for that purpose. He was the mere conduit through whom the title was transferred. He had no authority or right to change the contract and convey to other person or persons than those agreed upon. (*Stehlin v. Golding*, 15 N. Y. S. R. 814; *Stone v. Tift*, 15 Johns. 458; 1 Wash. on Real Prop. 176.)

The agreement was with the plaintiff, his sister, to convey to her an undivided one-half. Instructions to that effect were given to the scrivener, and the deed was executed by Ropke with the intention and for the purpose of carrying out the agreement. They are both parties to the agreement, and certainly as to them there was a mutual mistake in omitting the plaintiff's name from the deed. It is true that the agreement also embraced the husband. He was to buy one of the sister's interest for \$10,000, and was to receive a deed of the other undivided one-half of the New York property, that being the sister's interest which he had purchased. But this portion of the agreement is independent of that requiring Ropke to convey to the plaintiff her interest, and gave him no power, right or authority to change, alter or modify the agreement to convey to her.

The trial court, as we have seen, has found that the plaintiff received no consideration for the transfer of her interest in the property to her husband, and that she did not in fact know of it but understood and believed the title to be in herself until after his death. Here there was not even a gratuitous transfer of the property from the wife to the husband. There was no intention to convey or understanding that conveyance had been made. In such a case it is not necessary that there should be a fraudulent intention on the part of the husband to obtain title. Haack did not request the scrivener to omit the plaintiff's name from the deed, but as the scrivener recollects he requested that the deed should be so drawn that her interest would vest in him. This testimony was given

Opinion of the Court, per HAIGHT, J.

some six years after the transaction, and his recollection may not be exact in reference to the words used. Haack might not have intended to perpetrate a fraud upon his wife. But it would either be a fraud or a mistake, which would be sufficient to vitiate the conveyance. Occupying the confidential relation of husband and obtaining the conveyance under the circumstances disclosed, casts upon him the burden of showing that the conveyance was free from fraud or mistake. (*Boyd v. DeLa Montagnie*, 73 N. Y. 498.)

Again, we do not understand that the rights of the plaintiff would be affected even though it should be found that her husband acted for her as her agent. The consideration for the conveyance of the undivided one-half was hers. If her husband without her knowledge and consent procured the conveyance to be made to him, she would still be entitled to have it adjudged that he held the same in trust for her, notwithstanding the provisions of the statute which provide that: "Where a grant for a valuable consideration shall be made to one person and the consideration therefor shall be paid by another, no use or trust shall result in favor of the person by whom such payment shall be made, but the title shall vest in the person named as the alienee in such conveyance." (1 R. S., 728, § 51.)

For under section 53 the provisions of section 51: "Do not extend to cases where the alienee named in the conveyance shall have taken the same as an absolute conveyance in his own name without the consent or knowledge of the person paying the consideration." (*Reitz v. Reitz*, 80 N. Y. 538, 542.)

We therefore agree with the General Term, so far as this branch of the case is concerned, that the plaintiff has established a good cause of action for a reformation of the deed.

It remains to be seen whether she has forfeited that right by accepting the devise and legacy contained in the will of of her deceased husband.

In June, 1883, Heinrich A. Haack, the plaintiff's husband, died, leaving a last will and testament, which has been duly

Opinion of the Court, per HAIGHT, J.

proved and admitted to probate. By it he devised to his wife, the plaintiff, the real estate in Brooklyn on which he lived, and bequeathed to her the sum of \$10,000 in cash, which was to be in lieu of dower. He then gave his gold watch and chain to Henry Oest, and \$4,000 each to Wilhelmina Oest and Henry Oest, his nephew and niece. It then provides: "I give and devise to my sisters, Wilhelmina Ropke and Mary Oest, and my brother, Deidrick Haack, all the rest, residue and remainder of my estate, share and share alike." The plaintiff has accepted the provisions made in the will in her behalf, and the trial court has found that this acceptance on her part amounts to an election to hold under the will, and precludes her from setting up any legal or equitable claim of her own to the real estate in question. The rule appears to be unquestioned by the parties. It was well stated by DENIO, Ch. J., in the case of *Havens v. Sackett* (15 N. Y. 365-369). He there says: "One who accepts a benefit under a deed or will, must adopt the whole contents of the instrument, conforming to all its provisions and renouncing every right inconsistent with it. For example, if a testator has attempted to dispose of property in his own name and has given a benefit to the person to whom that property belongs, the legatee or devisee accepting the benefit so given to him must make good the testator's attempted disposition." If, therefore, the plaintiff's late husband has devised the real estate in equity belonging to her, her acceptance of the devise and bequest, under the will, precludes her right to maintain this action. She cannot accept and then prevent the other devisees under the will from receiving the portion intended for them. But, has he devised the real estate which equitably belonged to her? He knew that an undivided one-half of the property in question belonged to her, as her sole and separate property, having descended to her from her deceased father; he knew that he had taken the title of her interest in his own name, without her knowledge or consent; that equitably, it still belonged to her. He only gives to his brothers and sisters the residue and remainder of his estate, share and share alike:

Opinion of the Court, per HAIGHT, J.

he mentions no parcel of real estate intended to be covered by this provision, neither does he pretend to give them anything but that which is *his*. So that we are unable to see that there is anything in the will that is inconsistent with the claims of the plaintiff. It is argued that by allowing her to recover her interest in the real estate the provisions of the will will be defeated, and thus it is evident that he intended to devise that portion of the real estate equitably belonging to her; but such does not appear to us to be the effect. Under the partition agreement, she was to retain her interest in the real estate, which, as we have seen, was an undivided one-half. This was her sole and separate property. Her husband purchased the interest of her sister for \$10,000, which vested in him the other undivided one-half. Their interests were separate and distinct; it was that of tenants in common and not of joint tenants or tenants by the entirety. By accepting the provisions made for her by the will, she waived her right to dower. Therefore, her husband's undivided one-half of the real estate remained to be disposed of by the will. It appears that a legacy of \$10,000 was given to her and two other legacies of \$4,000 each were given to a nephew and niece, making \$18,000. The report of the executors show that the personal estate coming to their hands amounted to the sum of \$20,567.79 and the debts amounted to \$1,739.62, leaving a balance of \$18,828.17. The will contains no provisions charging the payment of the legacies upon the real estate, and, in view of the fact that the personal estate exceeded the amount of the legacies, we must assume that he expected and intended that they should be paid out of his personal property. This leaves his undivided half of the real estate in New York, which, at the time of his death, was valued at \$12,500, to pass to his brother and two sisters, under the residuary clause, thus carrying out all of the provisions of the will, doing justly to all objects of his bounty and robbing no one. If the conclusion of the trial court is correct, a very different result will be reached, for, under that view, the plaintiff, his widow, will be left without any substantial provisions made for her support

Statement of case.

and maintenance out of his estate. The real estate devised to her was encumbered by a mortgage for \$5,000. Prey, one of the defendant's witnesses, testified that it was worth about \$3,000 aside from the mortgage, which we must assume to be its full value. This added to the \$10,000 bequeathed to her, makes \$13,000, the entire amount that she get under the will.

If the real estate in question was worth \$25,000 at the time of his death, as claimed by the respondents, her half which was taken from her by her husband was worth \$12,500. The provisions of the will, therefore, but barely pay her for that which was her own, and, at most, leaves her but \$500, which she gets in lieu of dower, for her support and maintenance; and this out of an estate left by her husband of upwards of \$36,000, aside from her half of the real estate. It does not appear to us that such was the purpose or intent of her husband.

We are consequently of the opinion that the judgment should be reversed and a new trial ordered, and that the costs should abide the event.

All concur, except FOLLETT, Ch. J., dissenting, and BRADLEY, J., not voting.

Judgment reversed.

WILLIAM M. ALBERTI, Respondent v. NEW YORK, LAKE ERIE
AND WESTERN RAILROAD COMPANY, Appellant.

118	77
139	89
118	77
148	92
118	77
151	204

In an action to recover damages for personal injuries alleged to have been caused by defendant's negligence, evidence as to the poverty of the plaintiff, i. e., that he was dependent upon his earnings for his support, is incompetent, as bearing upon the question of damages, *Caldecell v. Murphy*, (11 N. Y. 416) questioned.

Inasmuch, however, as a person so injured is bound to act in good faith and to resort to such means as are reasonably within his reach to cure himself, where defendant has drawn out testimony to show that plaintiff had not had the best medical attendance, care and treatment, it is competent for the latter, for the purpose of showing that he resorted to such means as were reasonably within his reach, to prove the fact of his

Statement of case.

poverty and dependance upon his earnings, and consequently his inability to procure the best medical attendance.

Upon the trial of such an action, the attorney for the plaintiff has authority to expressly waive, on his behalf, the statutory provision prohibiting a physician from disclosing the information acquired by him while attending upon his patient in his professional capacity. (Code Civ. Pro. §§ 834, 836.)

It seems that the calling of the physician as a witness by his patient, is of itself an express waiver of the seal of secrecy imposed by the statute. *Strohm v. N. Y. L. E. & W. R. R. Co.*, (96 N. Y. 305) distinguished.

L., a medical witness called for plaintiff, was permitted to testify, under objection and exception, to his opinion as to the result of the disease in the natural and ordinary course, to-wit, that the plaintiff would never be any better and never be able to straighten his limbs. *Held*, no error. The witness was then asked to state the length of time plaintiff might live in the natural and ordinary course of events. Upon objection the court decided that the witness might answer if he could speak with reasonable certainty. He replied he could only give the probability from the history of similar cases, and this he was permitted to do under objection and exception. *Held*, no error.

Upon the trial plaintiff's counsel offered in evidence a photograph of plaintiff, showing the manner in which his limbs had contracted, as a result of the accident, proving by a witness, that it was taken in his presence and correctly represented the condition of plaintiff's limbs. The photograph was received under objection and exception. *Held*, no error; that it was competent on the same principle as a map or diagram. Reported below (43 Hun, 421).

(Argued November 27, 1889; decided December 17, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made February 15, 1887, which affirmed a judgment in favor of plaintiff, entered upon a verdict.

The nature of the action and the facts are sufficiently stated in the opinion.

Servis E. Carr for appellant. It was error to receive in evidence the deposition of the plaintiff and the testimony of his wife that the plaintiff had no other means of support for himself and wife than what he earned. (2 Sedg. on Dam. 552; *Morse v. S., etc., R. R. Co.*, 10 Barb. 621, 623, 624; *Ramson v. R. R. Co.*, 15 N. Y. 415; *Curtis v. R., etc., R. R. Co.*, 18 id. 534, 542; *Masterson v. Village of Mount*

Statement of case

Vernon, 58 id. 391, 395; *Leeds v. G. L. Co.*, 90 id. 26, 29; *Staat v. R. R. Co.*, 107 id. 625, 627; 1 S. & R. on Neg. 664, § 606; Wood on Railway Law, 1243; Thompson on Neg. 1263; Abb. Trial Evidence, 601; 2 Sedg. on Dam. [7th ed.], 545; *Moody v. Osgood*, 50 Barb. 628; *Myers v. Malcolm*, 6 Hill, 292; *Stockton v. Frey*, 4 Gill, 406; *Shaw v. R. R. Co.*, 8 Grey, 45; *M. etc., R. R. Co. v. Lyde*, 11 Am. & Eng. R. R. Cas. 188; *P. etc., R. R. Co. v. Roy*, 1 id., 225, 231, 232; 102 U. S., 451, 459, 460; *C. etc., R. R. Co. v. Boyfield*, 37 Mich. 205; *People v. Ganzales*, 35 N. Y. 49, 60; *Anderson v. R. R. Co.*, 54 id. 334, 341; *Baird v. Gillett*, 47 id. 186, 187; *Williame v. Fitch*, 18 id. 546; *Foote v. Beecher*, 7 Abb. N. C. 358, 361, 363; *Brague v. Lord*, 67 N. Y. 495, 499; *Havemeyer v. Havemeyer*, 11 J. & S. 506, 521, 522; *Coleman v. People*, 58 N. Y. 555, 562; *Paulilsch v. R. R. Co.* 102 id. 280.) There was error in the admission of the testimony of Dr Shepard, the plaintiff's attending physician. (*Edington v. L. Ins. Co.*, 66 N. Y. 185, 194, 195; *Dilleber v. Ins. Co.*, 69 id. 256, 260; *Grattan v. Ins. Co.*, 80 id. 281, 297; *Westover v. Ins. Co.* 99 id. 56; *Renihan v. Dennin*, 103 id. 573; *People v. Murphy*, 101 id. 126; *In re Coleman*, 111 id. 220, 226; *Shaw v. Kidder*, 2 How. Pr. 243; *Gaillard v. Smart*, 6 Cow. 383, 388; *Barrett v. T. A. R. R. Co.*, 45 N. Y. 628, 635; *Mandeville v. Reynolds*, 68 id. 528, 540; *Bowne v. Hyde*, 6 Barb. 392, 394; *E. R. Bank v. Kennedy*, 9 Bosw. 543, 550; *Murray v. House*, 11 Johns. 464; *Ball v. Bank of Alabama*, 8 Ala. 590; 42 Am. Dec. 649, 653, 654; *In re Stocking*, 6 La. Ann. 232; *Shores v. Casswell*, 13 Metc. 413; 2 Greenl. on Ev. § 141; *Clark v. Randall*, 76 Am. Dec. 252, 256, 258; *Marks v. City of Buffalo*, 87 N. Y. 184.) There was error in the admission of opinion as to the future consequences of this injury. (*Strohm v. R. R. Co.*, 96 N. Y. 305; *Curtis v. R. R. Co.*, 18 id. 534, 542; *Lincoln v. S. R. R. Co.*, 23 Wend. 425; *Tozer v. R. R. Co.*, 105 N. Y. 617; *In re Eysaman*, 113 id. 62, 70, 71.) The receipt of the photograph offered by the plaintiff and objected to by the defendant was error. (*Cowley v. People*, 83 N. Y. 464; *Hynes v. McDermott*, 82 id. 41, 50;

Statement of case.

Ruloff Case, 45 id. 213, 224; *Cozzens v. Higgins*, 1 Abb. Ct. App. Dec., 453; 3 Keyes, 206; *Bergmann v. Jones*, 94 N. Y. 51, 58; *Tooley v. Bacon*, 70 id. 34; *Daly v. Byrne*, 77 id. 182, 187, 188; *Fountain v. Pettee*, 38 id. 184, 185, 186; *Mulqueen v. Duffy*, 6 Hun, 299.)

P. B. McLennan for respondent. The defendant was guilty of negligence, which caused the plaintiff's injuries. (*Hegeman v. W. R. R. Co.*, 13 N. Y. 9; *Holbrook v. U. & S. R. R. Co.*, 12 id. 236; *Edgerton v. N. Y. & H. R. R. Co.*, 39 id. 229; *Seybolt v. N. Y., L. E. & W. R. R. Co.*, 95 id. 568; *Colwell v. N. J. S. Co.*, 47 id. 291; *Curtis v. R. & S. R. R. Co.*, 18 id. 534; *Coddington v. B. C. R. R. Co.*, 102 id. 66, 69; *Hegeman v. W. R. R. Co.*, 13 id. 9; *Bowen v. N. Y. C. R. R. Co.*, 18 id. 410; *Deyo v. N. Y. C. R. R. Co.*, 34 id. 9; *Caldwell v. N. J. S. Co.*, 47 id. 282; *Maverick v. E. A. R. R. Co.*, 36 id. 378.) The verdict rendered by the jury was not excessive. (Baylies on N. T. & Appeals, 505; *Minnick v. City of Troy*, 19 Hun, 252; *Gale v. N. Y. C. & H. R. R. Co.*, 13 id. 3-5; *Walker v. E. R. Co.*, 63 Barb. 200; *Shultz v. T. A. R. R. Co.*, 14 J. & S. 211, 89 N. Y. 242; *Rockwell v. T. A. R. R. Co.*, 64 Barb. 438; 53 N. Y. 594; *Gale v. N. Y. C. & H. R. R. Co.*, 13 Hun, 1; 76 N. Y. 694; *Harrold v. N. Y. El. R. R. Co.*, 24 Hun, 184; *Panzar v. T. F. M. Co.*, 16 N. Y. W'kly Dig. 241; *Ehrgott v. Mayor, etc.*, 96 N. Y. 271; *Groves v. City of Rochester*, 39 Hun, 5; *Dringham v. Stewart*, 41 id. 643; 111 N. Y. 188; 92 id. 219.) It is competent to show the earning capacity of the injured party. (*Ehrgott v. Mayor, etc.*, 96 N. Y. 264; *Leeds v. M. G. Co.*, 90 id. 26; *Lyons v. E. R. Co.*, 57 id. 490.) Any evidence which would legitimately tend to prove the extent or seriousness of plaintiff's injury, or to show what his actual condition was, was competent. (*Caldwell v. Murphy*, 11 N. Y. 416.) The privilege created by section 834 of the Code of Civil Procedure and by the provision of 2 R. S. 406, section 73 preceding it, may be waived by the patient, and the physician may be examined.

Opinion of the Court, per HAIGHT, J;

(*Johnson v. Johnson*, 14 Wend. 637; *Gallard v. Swart*, 7 Cow. 385; *Mark v. City of Buffalo*, 87 N. Y. 188; *Barrett v. G. A. R. R. Co.*, 45 id. 630; *Westover v. A. L. Ins. Co.*, 99 N. Y. 56.) It was proper for the plaintiff to offer in evidence a photograph showing the condition of the plaintiff as he then was. (*Cowley v. People*, 83 N. Y. 464; *Cousins v. Higgins*, 3 Keyes, 206; *Ruloff v. People*, 45 N. Y. 213; *Hone v. DePeyster*, 106 id. 589; *Strong v. N. Y., L. E. & W. R. R. Co.*, 96 id. 305, 306.

HAIGHT, J. This action was brought to recover damages for a personal injury.

In July, 1885, the plaintiff was a passenger upon the defendant's express train, and was seated in one of the sleeping cars. When the train was near Oxford, in the county of Orange, it came into collision with a partially displaced door of a freight car, going in the opposite direction, which broke the windows and the partition between them at which the plaintiff was sitting. He was struck by the broken pieces of glass and timber and so injured that the muscles of the legs contracted in such a way as to draw both legs up against his body and render him helpless.

No question is made but that there was sufficient evidence to take the case to the jury upon the main elements of the cause of action. It is claimed however that errors were committed in the rejection and exclusion of evidence which entitles the defendant to a new trial.

The plaintiff and his wife gave testimony to the effect that he was dependent upon his earnings for the support of himself and wife. This was given under the objection and exception of the defendant. As bearing upon the question of damages we think this testimony was incompetent. The rule of recovery is, compensation for the injuries sustained. Pain and suffering, loss of time, the expense of medical, surgical and other attendance, and the diminished capacity to earn in the future are all proper elements to be taken into consideration by the jury in determining the amount of the compensa-

Opinion of the Court, per HAIGHT, J.

tion that should be awarded. But in this regard the law is not a respecter of persons. It makes no distinction between the rich or the poor, and a jury has no right to consider that element in determining the amount of the pecuniary compensation.

In the case of *Myers v. Malcolm*, (6 Hill, 292, 296), NELSON, Ch. J., in delivering the opinion of the court, says: "A new trial must be granted in this case for the error of the judge in admitting evidence of the wealth of one of the defendants. This was clearly inadmissible, and it is impossible to say what effect it may have had upon the verdict."

In the case of *Moody v. Osgood* (50 Barb. 628), BARNARD, P. J., says: "Damages in these cases are not to be estimated by or proportioned to the wealth of the defendant. Indirect proof of the wealth of the defendant is just as admissible as direct proof and for the same reasons."

To the same effect are the decisions of the Supreme Court of the United States, and the courts of other states. (*Pennsylvania Co. v. Roy*, 102 U. S. 451, 459; *Shaw v. A., & W. R. R. Co.*, 8 Gray, 45; *C. & N. R. Co. v. Bayfield*, 37 Mich. 205; *Stockton v. Fry*, 4 Gill, 406; 2 Thomp. on Neg. 1263; Abb. Tr. Ev. 601; Wood on Railway Law, 1242.)

It does not appear to us that this evidence was competent as bearing upon the earning capacity of the plaintiff prior to the injury. It is true that the jury heard the plaintiff's condition described and saw his wife in the court room, but there was no evidence before them showing the style or manner in which they lived or the amount that was annually expended in their support, and this could not very well be determined by the jury by a mere inspection of the plaintiff's wife in the court room. The plaintiff had already stated the character and nature of his business before his injury, and subsequently stated the amount of salary that he received. His earning capacity was thus fully made to appear by direct and competent evidence. Nor are we inclined to sustain the admissibility of this testimony, upon the theory that it was competent as tending to prove that the plaintiff after the accident was unable to perform any labor. There was but little dispute in

Opinion of the Court, per HAIGHT, J.

reference to his actual condition. It was made to appear from the testimony of eye witnesses and expert physicians who had examined and satisfied themselves as to his condition. We are aware that in the case of *Caldwell v. Murphy* (11 N. Y. 416), the court there sustained this character of testimony upon the theory that having a family dependent upon him for support and being without means of support, except his labor and the charity of his friends, his omission to employ himself had a bearing upon the extent to which he had been disabled. But we regard that case as carrying the rule to the outside limit, and do not feel justified in following it in this case. We are thus brought to the inquiry as to whether this evidence was competent for the purpose of showing that the plaintiff used ordinary care to cure and restore himself; that he acted in good faith, and resorted to such means as were reasonably within his reach to make his damages as small as possible. It doubtless would be in case any such issue was tendered by the pleadings or raised by the testimony. A person who receives an injury through the carelessness of another, is bound to act in good faith and to resort to such means and adopt such methods as are reasonably within his reach to cure and restore himself. (*Lyons v. E. R. Co.*, 57 N. Y. 489.)

The answer denied any knowledge or information sufficient to form a belief as to the extent and seriousness of the injury complained of. The first witness sworn upon the trial on behalf of the plaintiff was Jonathan Allen, the plaintiff's father-in-law, at whose residence he had been since the injury. He testified as to the condition of the plaintiff upon his arrival and on down to the time of the trial, and gave the names of the doctors that had treated him. Upon the cross-examination he was asked if the plaintiff at any time since the injury had been under the charge of any physician especially skilled in this class of cases, and he answered that he had not any more than those he had mentioned, and it appeared that they were ordinary practioners in the country villages of Andover and Alfred. It was after this testimony was given that the evidence objected to was called out. We do not understand for

Opinion of the Court, per HAIGHT, J.

what purpose the defendant called for this testimony unless it was his purpose to show that the plaintiff had not had proper care and treatment. The physicians who testified on behalf of the plaintiff were cross-examined by the defendant's counsel and made to admit that they had never seen a case of this kind before, and consequently had no experience in treating such a case. It further appeared that there was an eminent physician in New York, by the name of Dr. Seguin, who was skilled in the treatment of diseases of this character. It was undoubtedly proper for the defendant to cross-examine the plaintiff's physicians as to their skill and experience in treating diseases of this character, as bearing upon the weight which should be given by the jury to the opinions expressed by them in reference to the durability of the disease, and that that evidence did not necessarily tender the issue as to whether the plaintiff had made use of the means reasonably within his reach to cure himself. But no such claim can be made as to the testimony called out from the witness Allen. He was not a physician and had not been called upon to express any opinion as an expert. The defendant had previously shown by the testimony of this witness that Dr. Seguin was especially skilled in that class of cases, and that he had not been called to treat the plaintiff, thus giving point and character to the testimony that the plaintiff had not been treated by any one especially skilled in such cases. It appears to us that this evidence was sufficient to raise such an issue and that the trial court was justified in admitting evidence that would tend to rebut and disprove such claim and that this was done by showing that he was poor and dependent upon his earnings, and was consequently not able to employ or pay a skilled physician to visit him from the city of New York. Upon this theory we are of the opinion that the evidence objected to was permissible.

Dr. Shepard was called as a witness for the plaintiff and asked to describe to the jury the condition in which he found the plaintiff on the morning after the accident, and what his condition had been from that time until the present. This

Opinion of the Court, per HAIGHT, J.

was objected to upon the ground that the question comes within the prohibition of the Code as a question of privilege. The counsel for the plaintiff conducting the trial then stated that as his attorney he waived the privilege. The objection was then overruled and an exception was taken by the defendant, and the doctor proceeded to state the condition of the plaintiff.

The Code of Civil Procedure provides that a clergyman or, other minister of any religion, shall not be allowed to disclose a confession made to him, in his professional character, in the course of discipline, enjoined by the rules or practice of the religious body to which he belongs. (§ 833.) And that a person, duly authorized to practice physic or surgery, shall not be allowed to disclose any information which he acquired in attending a patient, in professional capacity, and which was necessary to enable him to act in that capacity. (§ 834.) And that an attorney or counselor at law shall not be allowed to disclose a communication, made by his client to him, or his advice thereon, in the course of his professional employment. (§ 835.) Section 836 then provides: "The last three sections apply to every examination of a person as a witness, unless the provisions thereof are expressly waived by the person confessing, the patient or client." So that under the provisions of the latter section there must be an express waiver by the patient in order to make the testimony competent. The question then is, can such express waiver be made by an attorney of a person in his lifetime. The death of the client would undoubtedly terminate such agency and no one would then be permitted to speak for him, and the prohibition provided for by the Code would then doubtless continue forever. (*Westover v. Aetna Life Insurance Co.*, 99 N. Y. 56.)

But although dead he may leave behind him evidence which indicates an express intention to waive the privilege; as for instance, where he requests his attorney to sign the attestation clause of his will, he by so doing expressly waives the provisions of the statutes and makes him a competent witness to testify as to the circumstances attending its execution, including

Opinion of the Court, per HAIGHT, J.

the mental condition of the testator at the time. (*In the Matter of Coleman*, 111 N. Y. 220.)

RUGER, Ch. J., in delivering the opinion of the court in that case, says: "It cannot be doubted that if a client in his lifetime should call his attorney as a witness in a legal proceeding to testify to transactions taking place between himself and his attorney while occupying the relation of attorney and client, such act would be held to constitute an express waiver of the seal of secrecy imposed by the statute, and, can it be any less so when the client has left written or oral evidence of his desire that his attorney should testify to facts learned through his professional relations upon a judicial proceeding to take place after his death? We think not." If the calling of an attorney as a witness in behalf of his client is an express waiver of the seal of secrecy imposed by the statute, is not also the calling of a physician as a witness by his patient such a waiver? It is true that these remarks of the chief judge may not have been necessary in the decision of that case and may have been made by way of illustration, still the force of the argument is such as to commend itself to us as a correct and just interpretation of the statute. As we have seen, the physician was not only called as a witness on behalf of the patient, but his counsel who was conducting the trial in his behalf in open court expressly waived the prohibition of the statute. The attorney in conducting the trial stood in the place and stead of his client, representing him as his duly authorized agent. All that properly related to the conduct of the trial devolved upon the attorney. It was for him to determine what should or should not be presented as evidence, and it appears to us that he must be deemed to so far represent the client as to be authorized in his behalf to waive the privilege and remove the seal of secrecy to the evidence that he in his judgment saw fit to offer for and on behalf of his client. The power of an attorney to represent his client was considered in the case of *Mark v. City of Buffalo* (87 N. Y. 184). In that case the attorneys of the parties had agreed upon the amount that should be paid to the referees before whom the

Opinion of the Court, per HAIGHT, J.

case was tried. The Code fixed the fees of referees at six dollars for each day spent in the business of the reference, unless at or before the commencement of the trial a different rate of compensation is fixed by the consent of the parties. The parties had not agreed upon a greater rate than that provided for by the statute, but their attorneys had, and it was held that under their employment they had the power to so agree and that their clients were bound by their agreement.

Dr. Lewis, another witness sworn on behalf of the plaintiff, was asked to state what in his opinion will be the result of the disease in the natural and ordinary course. This was objected to on the ground that there was too much speculation connected with it. The objection was overruled and an exception taken, and the witness gave it as his opinion that the patient would never be any better, and that he never would be able to straighten his limbs. He was then asked to state the length of time that the plaintiff may live in the natural and ordinary course of events. This was objected to and the court ruled that he might answer if he could speak with reasonable certainty in reference thereto. The doctor answered that he could only give the probability from the history of other similar cases, and this he was permitted to do under the objection and exception of the defendant. It will be observed that as to the latter answer, the answer was as to the probability, and that in the former question he was called upon to express his opinion in reference to the result of the disease in the *natural and ordinary course*. It is claimed that this evidence is objectionable under the case of *Strohm v. New York, Lake Erie and Western Railroad Co.*, (96 N. Y. 305.) In that case the question was as to what might or may develop, and was not as to what would probably or was reasonably certain to develop. This question was considered in the case of *Griswold v. New York Central and Hudson River Railroad Co.* (44 Hun, 236; 115 N. Y. 61), and was again considered by us in the case of *McClain v. Brooklyn City Railroad Co.* (116 N. Y. 459), and under the rule as laid down in these cases we consider the evidence competent.

Dissenting opinion, per FOLLETT, CH. J.

During the trial, the plaintiffs counsel offered in evidence a photograph of the plaintiff showing the manner in which his limbs were contracted. This was permitted by the court under the objection of the defendant. Before it was done, however, one of the doctors testified that the photograph was taken in his presence and that it correctly represented the condition of the limbs. The only materiality of this evidence was to show the manner in which the limbs of the plaintiff were contracted. In this regard, the testimony of the physician is that it was a correct representation of them. This made it competent as a map or diagram. (*Archer v. New York, New Haven & Hartford Railroad Co.*, 106 N. Y. 589-603; *Wilcox v. Wilcox*, 46 Hun, 32-38; *Ruloff v. People*, 45 N. Y. 213-224; *Hynes v. McDermott*, 82 N. Y. 50.)

The judgment should be affirmed with costs.

FOLLETT, CH. J. (dissenting). This action is for the recovery of damages for a personal injury caused by the negligence of the defendant. On the trial the plaintiff was permitted to prove, against the objection and exception of the defendant that he depended on his earnings for the support of himself and wife. That he had no other means, and that since December 7 1885, his wife had been working what she could for the support of both. It is held in the prevailing opinion that this evidence was not admissible generally, nor on the question of damages which is well sustained by the authorities cited, and others might be added.

It is sought to sustain in this court the reception of the testimony on the ground (we use the language of the respondent's counsel) "that it was competent for the purpose of showing that the plaintiff used ordinary care to cure and restore himself; that he acted in good faith and resorted to such means as were reasonably within his reach to make his damages as small as he could."

The rule here stated was laid down in *Lyons v. Erie R. Co.* (57 N. Y. 490), in this language: "When one receives an injury through the carelessness of another, he is bound to use

Dissenting opinion, per FOLLETT, Ch. J.

ordinary care to cure and and restore himself. He cannot recklessly enhance his injury and charge it to another. If his arm be broken, he cannot omit to have it set and charge the loss of the arm to the wrong-doer. He is not obliged to employ the most skillful surgeon that can be found or resort to the greatest expense to ward off the consequence of an injury which another has inflicted upon him. He is bound to act in good faith and to resort to such means and adopt such methods reasonably within his reach as will make his damage as small as he can." The rule was reaffirmed in *Sauter v. N. Y. C. & H. R. R. Co.* (66 N. Y. 50), and must be regarded as a settled rule of law in this state. At this point it is important to inquire whether an issue, that the plaintiff had not used ordinary care to cure himself, had acted in bad faith and had failed to resort to such means as were reasonably within his reach, was raised on the trial. It is not alleged in the answer that the plaintiff was negligent in respect to the means used to affect his cure or that his attendants, professional or lay, were incompetent or negligent, and such an issue is not alluded to in the charge, nor do we find any trace of it in the evidence, unless it is contained in that quoted by the respondent's counsel for the purpose of sustaining this ruling, all of which we will now quote.

The first witness sworn in behalf of the plaintiff was his father-in-law, Jonathan Allen, who on his cross-examination testified: "Alfred Center is a place of from 800 to 1,000 inhabitants. Dr. Shepard is one of the practicing physicians in that place. The country about there is quite thickly settled for a farming country, farms averaging about a hundred acres to the farm. Dr. Shepard's practice is confined to that locality.

"Q. Some time after this injury, did you make any arrangement for Dr. Seguin to visit Mr. Alberti and examine him?
A. We did; yes, sir.

"Q. And about when was that? A. Mrs. Alberti can explain that better than I can, for she made the arrangement. I think it was the last of November or first of December, some time along then.

Dissenting opinion, per FOLLETT, Ch. J.

"Q. Did you have anything to do with making that arrangement? A. I did; I requested Dr. Hubbard of Hornellsville, who was one of the consulting physicians, with the advice of others, to send for Dr. Seguin.

"Q. Did you do that because you understood Dr. Seguin was skilled in that class of cases? A. We did; yes, sir.

"Q. And was that arrangement made for an examination with a view of having him treat Mr. Alberti? A. Yes, sir; and as I understand it the day was set for him to come up, but Mr. Alberti got so bad he thought he could not stand the examination, and I requested Dr. Hubbard to telegraph to Dr. Seguin to wait further orders, and he did not go then at all until quite recently. Dr. Shepard has been the attending physician. Dr. Crandall has been one of the consulting physicians. He has practiced at Andover. It is eight miles south of Alfred, on the Erie road. It is a place of about 1,000 inhabitants, it may be more, 1,200. Dr. Hubbard we have called once and Dr. Robinson once. Those were single visits. The treatment has been under the direction of Dr. Shepard.

"Q. Now, has Mr. Alberti at any time since this injury been under the charge of any one who was especially skilled in this class of cases? A. Well, no more so than these men I have mentioned.

"Q. Than such men in that ordinary practice would be? A. Yes, sir; I don't know what their skill is."

The plaintiff was not present at the trial, but his deposition taken March 26, 1886, pursuant to sections 872 and 873 of the Code of Civil Procedure was read in his behalf at the trial which occurred April 26, 1886. Among other statements the deposition contained the following: "I depend on my earnings for the support of myself and wife." The defendant objected to the reading of the sentence quoted "as incompetent and improper," but the objection was overruled, an exception taken and the sentence was then read. (Fol. 101.)

The plaintiff's wife was sworn in his behalf (being the sixth witness) and was asked: "Q. Has Alberti any other means of

Dissenting opinion, per FOLLETT, Ch. J.

support than what he earns?" This was objected to by the defendant "as incompetent and improper," but the objection was overruled, an exception taken and this answer given: "A. No, sir; he has not. Since the seventh of December I have been working what I could to support myself and him." (Fol. 247.) Dr. Mark Shepard, plaintiff's attending physician, was sworn in his behalf and testified, among other things, to his belief that the plaintiff was incurable. Upon cross-examination he testified:

"Q. What you are giving here is simply your opinion, is it not, in answer to these last questions? A. To these last questions, my opinion, yes, sir.

"Q. And that opinion is based upon your experience since you have been practicing, in part, is it not? A. Well, in a very small part, yes.

"Q. In part it is based upon what you had learned in regard to the human system and the various diseases before you commenced to practice? A. In part, yes.

"Q. Is it based upon anything except those two? A. Yes, sir. I commenced practicing in the spring of 1878. I graduated at the University of the City of New York, in the spring of 1878. I immediately commenced my practice at Alfred and Alfred Center. I attended this university two winter courses. During the time I have been practicing there I have not had under my charge another case like this. This is the first case of this kind that has come under my medical observation. When I came to see Mr. Alberti on the morning of the twenty-fifth of July, the examination revealed to me something I had not observed before in my medical experience.

"Q. And it has in its various stages—I mean this case—developed those things which you had never observed or known of in your medical experience before? A. Yes, sir.

"Q. Then, in your treatment of this case, there was nothing in your medical experience which guided you, was there? A. Yes, sir; there was. My general knowledge of the treatment necessary with troubles with the spinal cord, congestion and meningitis.

Dissenting opinion, per FOLLETT, Ch. J.

"Q. Did you ever have a case of meningitis? A. O, yes, lots of them."

Dr. Wm. M. Crandall, the physician who had been called in consultation with Dr. Shepard, was sworn in behalf of the plaintiff, and testified, that in his opinion it was very doubtful whether the plaintiff could ever recover. Upon cross-examination he testified: "I practice medicine at Andover, N. Y. This is seven miles from Alfred. Andover is a place of not over a thousand inhabitants. There is a country district around there. My practice has been confined mostly to that locality. I have not had occasion in my medical experience to treat a case like this. Because no two cases are exactly alike. Have had occasion to treat cases of meningitis, cerebro-spinal meningitis, I believe this to be a case of meningitis, that is my opinion in regard to it. I have seen others besides myself treat cases of meningitis. Have advised them with reference to them. Dr. Lewis, who was sworn here as a witness yesterday, Dr. Baker, Dr. Harmon — well, I don't know, I should be bothered, may be, to think of them all. They are physicians in the locality in which I live I don't think any of them ever made diseases of that kind a speciality.

"Q. Then have you ever seen the treatment of a case of this kind or of this class by some physician who made a speciality of diseases of that character? A. No, sir; I don't know as I can say I have."

Smith Ely, a physicial residing at Newburgh, made an examination of the plaintiff April 1st or 2d, 1885 in connection with Drs. Lewis, Crandall and Shepard, and was sworn as a witness in behalf of the plaintiff. He testified on cross-examination: "I don't say that it is impossible that he should recover. I don't think there is any doubt but that there was no lesion of the cord. There is some doubt whether the membranes were actually inflamed. I think the symptoms point to that.

"Q. Who is the best qualified to express an opinion on that subject, the ones who have made it a special study for life? A. Yes, I should think they would.

Dissenting opinion, per FOLLETT, Ch. J.

"Q. Is Dr. Seguin recognized as a standard authority on matters of that kind in this country? A. Yes, he is.

"Q. And you think he would be well qualified to express an opinion on those matters? A. Yes, of course.

"Q. You have heard the testimony here in regard to Alfred Center and you saw the place there yourself. Isn't it a fact that in ordinary country practice in a case of this character which required special treatment, the ordinary method is to put him under the hands or charge of some one who has special knowledge in that direction?"

Objected to by the plaintiff as incompetent and immaterial. The objection was sustained and the defendant excepted. It is possible to infer that this question was asked with reference to raising the issue that the plaintiff had been negligent in not employing a physician having special skill and experience in the treatment of injuries like the plaintiff's, but this question was excluded by the court. We have now quoted all the evidence referred to by the respondent's counsel for the purpose of sustaining this ruling, and we think it very clearly shows that no such issue as is now sought to be introduced into the case was presented on the trial. All of this evidence was given before the plaintiff rested. The defendant called four physicians: Doctors Seguin, Stillman, Robinson and Nye. The first three acquired their knowledge of the plaintiff's condition by being called in consultation by him, and Dr. Nye gave no evidence of consequence.

But two issues were contested at the trial: (1) Were the plaintiff's injuries caused by the actionable negligence of the defendant; (2) the extent of the injuries sustained and the probable duration of the consequences. To this second issue all of the medical testimony was directed and none of it tends to show that the plaintiff was negligent in the means adopted for his cure or that such a position was taken by the defendant at the trial, and it seems to us plain that this so-called issue has been raised out of the record for the purpose of avoiding the effect of the ruling discussed.

Statement of case.

The judgment should be reversed, and a new trial granted, with costs to abide the event.

All concur with HAIGHT, J., except FOLLETT, Ch. J., and POTTER, J., dissenting, and BROWN, J., not sitting.

Judgment affirmed.

SAMUEL VON WIEN, Respondent, v. THE SCOTTISH UNION AND NATIONAL INSURANCE COMPANY, Appellants.

In an action upon a policy of fire insurance, it appeared that plaintiff employed one S. to procure for him \$5,500. of insurance. S. employed R. who procured five policies of \$1,100 each, issued by different companies; these he delivered to plaintiff. They were issued at different dates, defendant's being one of the last issued. Subsequently plaintiff paid sufficient to pay the premiums upon three of the policies, with which R. paid the premiums on the three policies first issued, leaving the premiums on defendant's policy, and one other, unpaid. Neither plaintiff nor S. knew which of the policies had been paid when S. called upon plaintiff for the balance of the unpaid premiums. This he declined to pay, stating he had insurance enough, and did not want the policies, and handed back to S. two policies; he took them and ordered them cancelled. R. discovered that they were two of the policies the premiums of which had been paid; he reported to defendant plaintiff's refusal to pay and that he had returned two of the said policies by mistake. These R. promised to exchange, and he requested T, who was authorized by defendant to cancel policies, to mark off the one issued by it, which he assented to. Plaintiff, on being asked for the two policies which had not been paid for, promised to get them and give them to R. and pay the premium for the time they had run, if R. would deliver back the two paid policies. The goods were destroyed by fire the next day. The trial court found that prior to the fire, the insurance existing by virtue of the policy in suit was duly terminated, and directed judgment dismissing the complaint on the merits. *Held*, no error; that it appeared to be plaintiff's intention to surrender the policies on which the premium had not been paid, and to retain the others, and in handing over the two paid policies he made a mistake which the courts would rectify; and that S. and R. in doing what they did to have the policy in suit cancelled, merely carried out his directions.

Where, on the trial of an action by the court, the testimony is conflicting and the judgment of the trial court is reversed by the General Term upon the facts, as the trial court has the advantage of seeing and hearing

Statement of case.

the witnesses, its determination as to their credibility will be taken upon appeal to this court, and the evidence will be examined simply for the purpose of determining whether it is sufficient to authorize its findings. *Von Wien v. S. U. & N. Ins. Co.* (22 J. & S. 276), reversed.

(Argued December 8, 1889; decided December 20, 1889.)

APPEAL from order of the General Term of the Superior Court of the city of New York, made March 2, 1887, which reversed a judgment in favor of defendant, entered upon a decision of the trial court without a jury, and ordered a new trial.

The nature of the action and the facts are sufficiently stated in the opinion.

Wm. A. Jenner for appellant. It will be presumed in this court, in support of the judgment of the trial court, that the latter found such facts *in addition to those specified* in its decision, as are essential to *sustain* the judgment, provided there was evidence to warrant the finding of such additional facts. (*Oberlander v. Spiers*, 45 N. Y. 175; *Townsend v. Bargy*, 57 id. 665; *Meyer v. Lathrop*, 73 id. 315; *Emerson v. City of Syracuse*, 100 id. 577-584; *Coleman v. S. A. R. R. Co.*, 38 id. 201; *Valentine v. Connor*, 40 id. 248; *Oberlander v. Spiers*, 45 id. 175; *Meyer v. Lathrop*, 73 id. 315.) The reversal, however, having been on the facts, all the *facts* and every question of fact and law are before this court, in the same manner and to the same extent as they were before the General Term. (*Johnson v. Youngs*, 65 N. Y. 599; *Godfrey v. Moser*, 66 id. 250; *Sickles v. Flanagan*, 79 id. 224; *Knickerbocker v. Nelson*, 78 id. 137-143; *Van Wyck v. Walters*, 81 id. 352; *Schultz v. Hoagland*, 85 id. 464; *Crane v. Bandonine*, 55 id. 256.) The contract of insurance could be discharged by parol. The surrender of policies and indorsement of the cancellation thereon were not requisite. (*Stone v. F. Ins. Co.*, 105 N. Y. 543; *Grace v. A. C. etc., R. R. Co.*, 109 U. S. 278; *Herman v. N. etc., R. R. Co.*, 100 N. Y. 411; *Van Valkenburgh v. L. I. Co.*, 51 id. 465.)

Beuno Loewey for respondent. The policy in suit was of binding effect, although the premium had never been paid, and by its terms it could be cancelled only by the act of

Statement of case.

the assured or upon due notice given to him on the part of the company. (*Angell v. H. F. Ins. Co.*, 59 N. Y. 171; *Boehen v. W. U. Ins. Co.*, 35 id. 131; *Bennett v. M. F. Ins. Co.*, 14 Blatch. 422; 20 J. & S. 495.) The agency of the broker who procured the policies from defendant ceased with the delivery by him of the policies to plaintiff. The authority to procure the insurance did not carry with it any implied authority to destroy or cancel the policies when once procured. (*Herrman v. N. F. Ins. Co.*, 100 N. Y. 411; *Von Wein v. S. U. etc., Ins. Co.*, 20 J. & S. 490, 493.) The judgment of the trial court cannot be sustained upon the theory either of a ratification on the part of the plaintiff of the unauthorized cancellation of the policy, or of notice to the plaintiff on the part of the company of its intention to cancel. (*Burnap v. Nat. Bank*, 96 N. Y. 125, 126; *Bd. of Super. v. Clark*, 92 id. 391; *Tabbin v. Kallfleisch*, 52 id. 28; *Van Slyke v. Hyatt*, 46 id. 259; *Nixon v. Palmer*, 8 id. 401; *Lipman v. N. F. Ins. Co.*, 48 Hun, 503, 508; *Karlsen v. S. F. Ins. Co.*, 16 N. Y. S. R. 239.) The claim of the appellants, for the first time advanced upon the appeal, that if they have failed in their proof of the cancellation of the policy by the assured, the court should find a notice of cancellation by the company is entirely untenable. (*Rowan v. Hyatt*, 45 N. Y. 138.) The rule of law regarding cases reversed by the General Term upon the facts as announced by this court, is that the General Term must assume the responsibility of examining the whole case and determine where the truth lies. (*Moran v. Mc Larty*, 75 N. Y. 25; *Godfrey v. Moser*, 66 id. 250.) The respondent is entitled to sustain the reversal by the General Term by showing any error of law which is fatal to the judgment, whether made the reason of the action by the General Term, or whether wholly unnoticed by it. (*Ward v. Craig*, 87 N. Y. 550; *Krekeler v. Thaule*, 73 id. 668; *Mackey v. Lewis*, 73 N. Y. 382; *Powell v. Tuttle*, 3 id. 396; *Lewis v. Ingersoll*, 3 Abb. Ct. App. Dec. 60; *Anderson v. R. W. & O. R. R. Co.*, 54 N. Y. 334, 340, 341; Greenleaf on Evidence, § 113; *Luby v. H. R. R. Co.*, 17 N. Y. 131.)

Opinion of the Court, per HAIGHT, J.

HAIGHT, J. This action was brought upon a policy of insurance to recover the amount of loss sustained by reason of a fire.

The policy was issued September 28, 1883, by Lothrop & Scott, who were the agents of both the defendant and the Lion Fire Insurance Company. The fire occurred on the 29th day of November, 1883. It appears that the plaintiff employed one Victor Spitzer to procure \$5,500 of insurance upon his stock of goods, and that Spitzer procured one John H. Rieger to procure such insurance; that thereupon Rieger procured five policies of insurance each in the sum of \$1,100 to be issued by different companies, one of which is the policy in suit, and delivered them to Spitzer who delivered them to the plaintiff. These policies were issued at different dates, that of the defendant and of the Lion Fire Insurance Company being the last that were issued. The premium upon these policies was thirty-three dollars each, amounting in the aggregate to \$165. Subsequently the plaintiff delivered to Spitzer \$100 to pay upon the premiums and Spitzer delivered ninety-nine dollars thereof to Rieger who paid the premium upon three of the five policies which were first issued, leaving the premium on the policies issued by the defendant and the Lion Fire Insurance Company unpaid. It further appears that numerous demands were made upon the plaintiff to pay the remaining sixty-five dollars due and owing for premiums upon these policies, but that the amount had not been paid at the time of the fire.

The trial court found as facts that "on or about November 26, 1883, the plaintiff, by his agent duly authorized thereto, informed the defendant that the plaintiff did not wish the said insurance. That on or about November 27, 1883, by agreement between Mr. Talbot, duly authorized on behalf of the defendant, and the said Rieger, duly authorized on behalf of the plaintiff, the said insurance existing by virtue of the policy mentioned in the complaint in this action was duly terminated and the said insurance ceased," and, as a conclusion of law, that the defendant was entitled to a judgment dismissing the complaint upon the merits.

Opinion of the Court, per HAIGHT, J.

The plaintiff excepted to the findings of fact above quoted, and on review by the General Term, that court was of the opinion that there was no evidence sustaining such findings and therefore ordered the judgment reversed on the facts as well as the law.

The duty, therefore, devolves upon us of determining whether or not this finding is sustained by the evidence. Upon this branch of the case there was a sharp conflict in the testimony which involved the credibility of the witnesses. The trial court in its opinion calls attention to this and states that "after a careful examination of the testimony of both sides, and giving to each the weight which it seems to me to deserve, by reason of its greater or less probability in connection with all the surrounding circumstances of the case, I have come to the conclusion that the facts are as testified to by the witnesses examined for the defense." Inasmuch as the trial judge had the advantage of seeing and hearing the witnesses deliver their testimony, he could form a more accurate judgment than a court on review as to their reliability and truthfulness. We shall, therefore, only call attention to the testimony of defendant's witnesses for the purpose of determining whether it is sufficient to authorize the finding of the trial court to which attention has been called. In the first place there appears to be no controversy in reference to the other facts to which we have called attention; that the premium had been paid upon three of the five policies issued and delivered to the plaintiff, and that it had not been paid upon the policy in suit or that of the Lion Fire Insurance Company, and that the plaintiff had been dunned for the balance of the premium that was due. It further appears that neither Spitzer nor the plaintiff knew which of the three policies had been paid for when the transaction to which we now call attention took place. Spitzer testified on behalf of the defendant that he called upon the plaintiff for the balance of the unpaid premium; that he had delivered the five policies to the plaintiff the latter part of September, and the latter part of October had received \$100 from him as part payment for the

Opinion of the Court, per HAIGHT, J.

amount due; that he told him after dunning him about twenty-five times, that the matter was getting a little unpleasant with the companies; that he had to have the money or the policies; that he could not be bothered longer as he was losing his reputation with the companies and he could not afford to do so. The plaintiff then turned around and said: "Well, I don't want your policies," and he went to the safe. "He said he had enough insurance and did not want any more, and he threw me out two policies; one on the Trans-Atlantic, and one on the Mechanics and Traders. I took these policies down to Mr. Rieger and ordered them cancelled." Rieger was called on behalf of the defendant and testified that he had been dunned so hard by the company that he went to Spitzer and told him that he wanted the thing fixed up; that he must bring the money or the policies; that the company would not let it run longer. That Spitzer thereafter came to his office on the Monday afternoon before the fire and said that he had been down to see the plaintiff and that the plaintiff said to him that he could get along without the insurance of these two policies and that he had given them back to him; that Spitzer thereupon handed him two policies, one on the Trans-Atlantic and the other on the Mechanics and Traders; that he looked at the two policies and saw that they were two of the three on which the premium had been paid and that they were not the two that he wanted. He further testified that the next morning he went to the office of the defendant and saw Mr. Talbot and told him that the plaintiff had sent word the afternoon previous that he would not pay for these policies, that he had insurance enough without them; that he had sent down two other policies by mistake so that he could not surrender his two; that he told him he would go up and exchange the policies at the first opportunity and bring them down, and in the meantime he wanted Talbot to mark off his two policies; that Talbot grumbled somewhat at having the policies run for sixty days and then thrown back as not wanted, but said that he would consider them off. Talbot had authority to cancel policies on the part of the defendant and

Opinion of the Court, per HAIGHT, J.

gave testimony corroborating the statement of Reiger as to what had transpired in reference to the cancellation of the policy in suit. Rieger further testified that that afternoon or the next morning he went and saw the plaintiff and asked him to pay for the time the policies had run which was two months and that he refused to do so; that he then stated to the plaintiff that he had sent down two policies that had already been paid for and that he could take those policies and have them cancelled and get back money enough to pay the amount due for the two months on these policies and that these two policies had been already cancelled on the books of the company; that that would cut him off from four policies or of an insurance of \$4,400; that the plaintiff then wanted to know how much he owed, etc. Subsequently further testimony was given to the effect that he asked the plaintiff for the two policies on which the premium had not been paid and that the plaintiff stated that he did not have them there but had them at his home and said that he would bring them down on the following Saturday and give them to the witness and pay eleven dollars, the amount of the premiums for the two months, if the witness would deliver back the two policies delivered to Spitzer.

The General Term appears to have reached the conclusion that this testimony did not authorize the cancellation of the policy in suit; that it was the two policies delivered by the plaintiff to Spitzer that he authorized to be cancelled and not the two policies on which the premium had not been paid. But did the plaintiff intend to authorize Spitzer to have those two policies cancelled? He had paid the premium upon three of the five policies; he did not know which, and being of foreign birth and evidently unfamiliar with the transaction of business of this character, doubtless supposed that it did not make any difference. He did not even keep or remember the names of the companies who had issued the two policies delivered up by him. He had been dunned time and again for the balance of the premium due. He knew that there was premium due upon two policies, and that it had been paid upon three. He

Statement of case.

had concluded that he had insurance enough and could get along without the two on which the premium had not been paid, and it is quite evident to our minds that it was his intention to surrender up the policies on which the premium had not been paid and retain the other three, and that in handing over to Spitzer the two policies on which the premium had been paid in full he made a mistake which the courts would readily rectify. If, therefore, it was his intention to surrender up the policies on which the premium had not been paid, Spitzer and Rieger in doing what they did to have the policy in suit cancelled merely carried out his directions as he himself intended.

It consequently appears to us that the finding of the trial court is sustained by the evidence.

The order of the General Term should be reversed, and the judgment of the trial court affirmed, with costs.

All concur.

Order reversed and judgment affirmed.

THE PEOPLE ex rel. THOMAS R. DEVERELL, Respondent, v.
THE MUSICAL MUTUAL PROTECTIVE UNION, Appellant.

In proceedings by *mandamus*, to compel a restoration of the relator to membership in defendant's organization on the ground that he had been unlawfully expelled, the following facts appeared: By defendant's charter (chap. 168, Laws of 1864, as amended by chap. 321, Laws of 1878) it is provided that it may make by-laws, and that any member violating them may be expelled after being afforded an opportunity to be heard in his defence in such manner as the by-laws shall prescribe. The by-laws provide that it shall be the duty of defendant's board of directors to investigate all charges against members; that any member bringing a charge against another shall be required to appear personally and substantiate his charge; that the secretary shall notify the parties to appear, and if either party fail to appear, a default shall be taken, or a postponement shall be had until the next meeting of the board upon the written request of either party, fully stating acceptable reasons; also that no expulsions shall be made except on charges preferred, a copy of

Statement of case.

which shall be served upon the member charged and he given a reasonable opportunity for his defense. A member made a charge in writing against the relator, founded upon two letters written by him. A copy of the charges were not served upon the relator, but he was served with a notice to attend a meeting of the board of directors on a date named, to then answer why he should not be fined or expelled from membership. He appeared, the letters were exhibited to him and he admitted having written them, but denied jurisdiction in the board to try him on account of anything contained in them. The relator asked and was informed who made the charges against him. After calling attention to the fact that that member was not present he withdrew without asking for a postponement. He thereafter received notice that he had been expelled. *Held*, that the relator's appearance was not a waiver by him of the requirements of the by-laws, or recognition of the right of the board to proceed without observance of the regulations; that his expulsion was illegal and he was entitled to a peremptory *mandamus* for his reinstatement; and that a return having been made to an alternative writ, damages were properly allowed in the final order, for loss suffered in consequence of his expulsion. (Code Civ. Pro., § 2088.)

It appeared that by reason of his non-membership, after expulsion, the relator was discharged from the service in which he was engaged. *Held*, that this was the proximate result of the cause of which he complained, and as such furnished a ground for the award of damages, and that the conclusion of the trial court, as to the amount, was not reviewable here.

Leeds v. M. G. L. Co. (90 N. Y. 26), distinguished.

Defendant's by-laws authorized the society to reinstate an expelled member by a two-thirds majority of all members present, after having paid all dues and fines standing against him, and an extra fine of fifty dollars, and that applicants for reinstatement must pass an examination the same as those for original membership. *Held*, that relator was not required to exhaust to the means so provided for re-instatement before resorting to a *mandamus*; that those provisions relate to cases of expulsion supported by proceedings lawfully conducted and where the appeal is to the discretionary power of the society.

(Argued December 5, 1889; decided December 20, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made July 23, 1886, which affirmed a judgment in favor of the relator entered upon the decision of the court on trial without a jury.

The nature of the proceeding and the material facts are stated in the opinion.

Statement of case.

Horatio C. King for appellant. The board acquired jurisdiction of the person of the relator. (*Allen v. Malcom*, 12 Abb. [N. S.] 335; *People v. Underwriters*, 7 Hun, 248, 252, 253; *People v. N. Y. C. Ass'n.*, 18 Abb. Pr. 271, 283, 284.) All that the relator was entitled to by law and by the constitution and by-laws of the society was an *opportunity* to be heard. (*People v. Underwriters*, 7 Hun, 248, 252, 253; *Lambert v. Addison*, 46 L. T. Rep. 20, 24; 16 Am. L. Rev. 427; *Loubat v. Leroy*, 15 Abb. N. C. 33.) The question is whether defendant did not have the power and jurisdiction to determine that the relator exercising such right in the *particular offensive manner he did* and complained of, was guilty of a violation of "good faith and fair dealing." That subject was committed by the legislature and constitution of the defendant to the determination and jurisdiction of the society. (Laws 1878, chap. 321, § 1; *People v. Underwriters*, 7 Hun, 248, 252, 253; *People v. Comm. Council*, 78 N. Y. 33; *Hunt v. Hunt*, 72 id. 228, 229; *Lange v. Benedict*, 73 id. 27.) Relator had an adequate, legal, specific *remedy* by an *appeal* to the *society* at large at any regular quarterly meeting, and, therefore, under well established rules he was not entitled to the remedy by *mandamus* until after he had first exhausted that by appeal in the organization. (*La Fond v. Deems*, 81 N. Y. 508, 514; *Poultney v. Backman*, 31 Hun, 49; *Harrington v. Ass'n.* 27 Alb. L. J. 438; High on Ext. Rem. §§ 16, 179, 429.) It was error to allow the relator the \$400 as damages. (*Rector v. Clark*, 78 N. Y. 21, 23; *Burke v. St. John*, 25 Hun, 541; High on Extr. Rem. § 301; *In re Paine*, 1 Hill, 665; *King v. Griffiths*, 5 B. & Ald. 731; *Marion, S. etc. v. Com.* 31 Penn. St. 82; *Leeds v. M.G. Co.*, 90 N. Y. 26; *Gill v. N. Y. C. Co.*, 48 Hun, 527; *Searles v. M. R. R. Co.* 23 W'kly Dig. 150; *Ihl v. F. S. S.R. R. Co.*, 47 N. Y. 318.)

W. Wickham Smith for respondent. If any provision of the constitution or by-laws of the defendant corporation relating to expulsion was substantially violated by defendants in the proceeding which resulted in the expulsion of the

Statement of case.

respondent, that expulsion was illegal, and he was entitled to a peremptory *mandamus* for his restoration. (Bagg's Case, 11 Coke, 93; *Comm. v. S. P. P. Society*, 2 Birm. 441; B. B. Ass'n Case, 35 Penn. St. 151; Ben. Ass'n Case, 38 Pa. 299. *People ex rel. v. Med. Soc.*, 24 Barb. 570; *People v. Med. Soc.*, 32 N. Y. 185; *Schweiger v. Society*, 13 Phila. 113; *People v. S. F. B. Society*, 24 How. Pr. 316; *People v. S. S. Harbor*, 5 Abb. [N. S.] 119; *White v. Brownell*, 2 Daly, 329; *Hutchinson v. Lawrence*, 67 How. Pr. 38; *Loubat v. Leroy*, 40 Hun, 546; *People ex rel. v. M. P. Union*, 47 Hun, 273; *Commonwealth v. G. Society*, 15 Pa. St. 251; *Wachtel v. N. W. & O. Ass'n*, 84 N. Y. 28; *People v. Am. Institute*, 44 How Pr. 468; *M. & S. Soc. v. Weatherly*, 75 Ala. 248; *Rochler v. M. A. Soc.*, 22 Mich. 87; *Murdock v. Phillips Acad.*, 12 Pick. 244; *Fisher v. Keane*, L. R. [Ch. Div.], 353; *Labouchere v. Earl of Warncliffe*, L. R. [13 Ch. Div.], 346.) The non-service of the charge was not waived by the appearance of relator at the time and place specified in the notice to ascertain the nature of the complaint against him, and the board did not thereby acquire jurisdiction. (*Labouchere v. Earl of Warncliffe*, L. R., 13 Ch. Div. 346; *March v. Huron College*, 27 Grant's Ch. 305; *Downing v. C. Soc.*, 10 Daly, 262; *People ex rel. v. M. M. P. Union*, 47 Hun, 273.) Under article 3, section 9 of the by-laws of the corporation, this case should have been dismissed by default for the failure of the prosecutor to attend, and the board had no jurisdiction to proceed further with the matter. (*Hutchinson v. Lawrence*, 67 How. Pr. 47; *Loubat v. Leroy*, 40 Hun, 546.) There was no remedy left to relator within the corporation, failure to pursue which disentitles him to relief by *mandamus*. (*Merischeim v. M. M. P. Union*, 47 Hun, 273.) Relator was entitled to have the damages sustained by him by reason of defendant's false return to the alternative writ assessed and awarded in this proceedings. (3 Blackst. Com., chap. 7, pp. 110, 264; 1 Evan's Stat. 176; Code Civ. Pro., §§ 2067, 2090; *People ex rel. v. Super.*, 28 N. Y. 112; *People v. Batchellor*, 53 id. 128; *Marion Soc. v. Comm.*, 31 Penn.

Opinion of the Court, per BRADLEY, J.

St. 82.) The finding of the court as to the amount of the damages is not reviewable in this court. (*Field v. Munson*, 47 N. Y. 221; *Ihl v. R. R. Co.*, Id. 317; *Baker v. Spencer*, Id. 562; *Bryce v. L. F. Ins. Co.*, 55 id. 240; *Pratt v. N. Y. C. Ins. Co.*, Id. 505; *Marvin v. B. I. M. Co.*, Id. 538; *Maher v. R. R. Co.*, 67 id. 52; *Smith v. Truslow*, 84 id. 60.)

BRADLEY, J. The defendant was incorporated by Laws of 1864, chapter 168, to which an amendment was added by Laws of 1878, chapter 321. Its object was "the cultivation of the art of music in all its branches, and the promotion of good feeling and friendly intercourse among the members of the profession, and the relief of such of their members as shall be unfortunate, * * * and the establishment of a uniform rate of prices to be charged by members of said society, and the enforcement of good faith and fair dealing between its members." It is also provided that the defendant may make by-laws, and that any member violating any of them may be expelled from the society (after being afforded an opportunity to be heard in his defense) in such manner as it may by its by-laws prescribe. The relator was expelled from the society on July 31, 1885, by its board of directors. This proceeding by alternative writ of *mandamus* instituted for the restoration of the relator to his membership of the defendant, was founded mainly upon the ground, alleged by him, that his expulsion was improperly made in this, that it was done without trial or opportunity given him to be heard. The character of the charges upon which the action of the board of directors was founded, was not the subject of consideration of the court below. The only question here has relation to the proceedings taken with a view to the result given by the action of the board. And its disposition is dependent upon the result of the inquiry whether the board of directors acquired jurisdiction of the person of the relator in the proceedings had for his expulsion. This depends upon the facts found by the trial court, so far as they have the support of evidence, having in view the by-laws of the society, by which it is provided that it shall be the duty of the

Opinion of the Court, per BRADLEY, J.

board of directors to investigate all charges against members; that any member bringing a charge against another member before the board, shall be required to appear personally and substantiate his charge; that the secretary shall notify the parties to appear, and if either party fail to appear the case shall go by default, or be postponed to the next meeting of the board upon the written request of either party fully stating the reasons acceptable to the board; and that a member may be expelled for the non-observance of its constitution, by-laws or rules, but that no such expulsion shall be made except on charges preferred, a copy of which shall be served upon the member so charged, and such member shall have a reasonable opportunity for his defense. One of the objects of the union, as stated in its constitution, is the enforcement of good faith and fair dealing between its members.

The charge made against the relator was founded upon two letters, written by him having in view, as alleged, the displacement, from his position in a musical band, of one of the members of the defendant and the procurement of such position for himself. The charges as made by the member were not served upon him. This was a substantial jurisdictional defect in the proceedings taken for his expulsion, and rendered it void unless such omission was in some manner obviated. It is contended on the part of the defendant that such service of the charges was waived by the relator, and upon that contention arises the main question for consideration. The relator was served with a notice of the secretary summoning him to attend a meeting of the board of directors on the 24th of July, 1885, to then answer why he should not be fined or expelled from membership. He then appeared. The letters he had written were then exhibited to him, the writing of which he admitted, and stated that they were private letters with which the board had nothing to do, and that he denied its jurisdiction to try him on account of anything contained in such letters. The secretary then said to him "That is all." Thereupon the relator asked, and was informed, who made charges against him. The member by whom the charges

Opinion of the Court, per BRADLEY, J.

were made was not present and, after calling attention to that fact, the relator withdrew without making any request for the postponement of the matter. He received no further notice of it until August sixth, when the notice that he was expelled July thirty-first was served on him. It also appears that the charges were made by the member against him in writing. Upon this state of facts, found by the trial court, it was as conclusion of law determined, that by reason of the failure to serve the relator with a copy of the charges, the board of directors acquired no jurisdiction of the person of the relator; that the proceedings were irregular and void, and that he was entitled to a peremptory *mandamus* for his restoration, and to recover \$400 damages, and judgment was directed accordingly with fifty dollars costs. There was some evidence to support the facts found by the trial court. If the relator, when he appeared pursuant to the summons served on him, had submitted himself to the jurisdiction of the board of directors in the matter, it would have been a waiver of the necessity of serving him with the charges. This a party may do when summoned to appear before any tribunal having jurisdiction of the subject-matter involved. But in view of the facts which the court was permitted to, and did find upon supporting evidence, was there any submission of the relator to the jurisdiction of the board? He denied the jurisdiction and, observing the absence of the member who had made the charges, he went away. This furnished no fair opportunity to suppose that it was unnecessary to observe any step in the proceeding, made requisite by the by-laws to its jurisdiction. It is true, his attention was called to the letters when he appeared in obedience to the summons, but the court refused to find that before such appearance he was acquainted with the charges, and found to the contrary. This was supported by the evidence of the relator. It may be that he then understood that those letters were the foundation of the charges but no charges were served upon him. The conclusion of the court was warranted that he did not submit himself to the jurisdiction of the board for the purposes of the proceeding;

Opinion of the Court, per BRADLEY, J.

and that the service upon him of the charges as made by the accusing member, was not waived. No steps were taken in it while the relator was present. He was not called upon to do anything on that occasion, nor did he request any postponement or that anything be done by way of advancement of the proceeding. In view of the facts found by the trial court, there was no recognition by him of the right to proceed without observance of the regulations prescribed for the action, in such case requisite to jurisdiction. The purpose of the by-laws made pursuant to the authority given by the statute, was to preserve the rights of the members of the defendant against arbitrary action to their prejudice; and the board of directors as a *quasi* judicial body, could not effectually expel a member without giving him all the opportunities for defense provided by the by-laws having relation to a proceeding for such purpose, and so far as the requirements in that respect are not waived they must be substantially observed. (*Loubat v. Leroy*, 40 Hun, 546, 552 and cases there cited; *People ex rel. Merschein v. M. M. P. Union*, 47 Hun, 273; *Watchel v. N. W. & O. Benevolent Society*, 84 N. Y. 28.) And when a proceeding in disregard of such jurisdictional provisions results in the expulsion of a member, he may for his reinstatement have a remedy by *mandamus*. It is, however, urged that before resorting to this remedy, it was incumbent upon the relator to exhaust the means within the power of the organization for his restoration; and reference is made to the provisions of the by-laws authorizing the society to reinstate an expelled member "by a two-thirds majority" of all members present, after having paid all dues and fines standing against him, and an extra fine of fifty dollars, and applicants for reinstatement must pass an examination the same as those for original membership. (Art. 13, §§ 2, 3.) Those provisions seem to have relation to cases of expulsion supported by proceedings lawfully conducted, and where the appeal is to the discretionary power of the society available for the restoration of the expelled member, only on payment by him of an extra fine. There seems to be no adequate remedy provided by the by-laws for a

Opinion of the Court, per BRADLEY, J.

case like the present one, where the remedy is founded upon the alleged right of restoration, subject to no fine or to examination as are applicants for membership.

It is contended that the court erred in awarding any damages to the relator and in the amount so awarded. The statute provides that where return has been made to an alternative writ issued upon the relation of a private person, the court, upon making a final order for a peremptory *mandamus* must, if the relator so elects, award to him, against the defendant, the same damages which the relator might recover in an action against the defendant for a false return. (Code, § 2088).

The damages allowed by the court were those which the relator was deemed to have suffered in consequence of his expulsion, and they arose from the fact that, by reason of his non-membership, so produced, he was discharged from the service in which he was engaged, and thus deprived of the income, which he otherwise would have received. This was the proximate result of the cause of which he complained, and as such furnished a ground for the award of damages. (*People v. Supervisors*, 28 N. Y. 112.) The amount of such damages awarded as distinguished from the \$100 allowed for expenses, was \$300. There was some evidence upon which to base their estimate, and the question in this respect differed from that in *Leeds v. M. G. L. Co.* (90 N. Y. 26).

The conclusion of the trial court as to the amount is not reviewable here.

The judgment should be affirmed.

All concur, except BROWN J., not sitting.

Judgment affirmed.

Statement of case.

BENJAMIN W. FRANKLIN, Respondent, v. MARY C. BROWN,
Appellant.

In an action to recover the last quarter of rent reserved by a lease for one year of a furnished dwelling-house, the answer set up as a counter-claim damages alleged to have been sustained on account of the breach of an implied covenant that said house was fit for immediate and permanent occupation. The referee found that during the term of the lease noxious gases and strong, unhealthy and disagreeable odors existed generally and in large quantities throughout the house, making defendant sick and rendering the house unhealthy and unfit for human habitation. That said gases, odors, etc., did not arise in or from any part of said house, but came from adjoining premises. That neither party knew of their existence when the lease was executed. It was not claimed that there was any deceit or false representations to plaintiff as to the condition of the house or its fitness for the purpose for which it was let. It appeared that defendant thoroughly examined the premises before signing the lease, and neither ceased to occupy nor attempted to rescind until the last quarter of the term. *Held*, that defendant's counter-claim was not tenable; and the fact that personal property was in part the subject of the lease did not affect the question.

The law will not imply a covenant in a lease as to conditions not under the control of the lessor; and with reference to which he and the lessee being ignorant, neither could be supposed to have contracted.

Smith v. Marrable (11 M. & W. 5); *Wilson v. Hatton* (L. R., [2 Exch. Div.] 336), distinguished and questioned.

The lessee of real property must run the risk of its condition, unless he has an express agreement on the part of the lessor in relation thereto. Reported below (21 J. & S. 474).

(Submitted December 5, 1889; decided December 20, 1889.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made May 6, 1886, which affirmed a judgment in favor of the plaintiff, entered upon the report of a referee.

This action was brought to recover the rent reserved by a lease of a furnished dwelling-house.

The answer pleaded a counter-claim for damages alleged to have been sustained by the defendant on account of a breach of an implied covenant that said house was fit for immediate and permanent occupation.

Statement of case.

The referee found that on the 14th of September, 1883, the parties entered into a written agreement whereby plaintiff leased to the defendant the dwelling-house, known as No. 6 West Seventeenth street in the city of New York, for the term of one year at the annual rental of \$3,100, and that the defendant covenanted to pay said sum in equal monthly payments, commencing on the first day of November thereafter. He also found due performance on the part of the plaintiff, and a failure to perform on the part of the defendant, who omitted to pay the rent which became due for the months of July, August and September, 1884, the last three months of the term. Upon the request of the defendant the referee further found that said house was leased to her to be used as a private residence; that the furniture therein was a large and important element in determining the amount of rent to be paid; that during the time covered by the lease noxious gases and strong, unhealthy and disagreeable odors "existed generally and in very large quantities throughout said furnished dwelling-house," making the defendant sick and rendering the house unhealthy and unfit for human habitation, and that she incurred certain expenses as the immediate and necessary result of occupying such premises. The referee, however, added to these findings that said gases, odors, etc., did not arise in or from any part of said house, but that they came from the adjoining premises which were used for a livery stable, and that neither party knew of their existence when the lease was executed.

John G. Agar, for appellant. Contracts for the letting and hiring of ready-furnished houses and apartments are contracts of a mixed nature, partaking partly of a demise of realty, and partly of a contract for the letting and hiring of movable chattels. (1 Addison on Cont. 293, 343, 344; *Harrington v. Snyder*, 3 Barb. 381; *Horn v. Meakin*, 115 Mass. 330; *Fowler v. Locke*, L. R., 7 C. P. 280; *Lyon v. Mells*, 5 East. 437; *Steel v. S. S. Co.*, 3 App. Cas. 72; Domat L. 1, tit. 4, §§ 3, 8; Digest Lib. 10, tit. 2, 19, § 1; Pothier Louage No. 54; Story on Bailments, § 383; *Clews v. Willoughby*, 7 Hill, 88.)

Statement of case.

In letting a furnished house for immediate use there is an implied covenant that the thing let should be fit for the use for which it is let. (*Smith v. Marrable*, 11 M. & W. 5; *Sutton v. Temple*, 12 id. 60, 61; *Wilson v. Finch*, L. R. [2 Exch. Div.] 336; *Bird v. Lord Greville*, 2 B. Div. [1 C. & El.] 317; *Gillhooley v. Washington*, 4 N. Y. 222.) Referee erred in refusing to find that defendant did not waive her right to seek damages for breach of said implied covenant by not rescinding or seeking to rescind the contract set forth in the complaint. (*Muller v. Eno*, 14 N. Y. 597; *Parks v. Morris Co.*, 54 id. 586; *Schwinger v. Raymond*, 83 id. 197; *Williams v. Vanderbilt*, 28 N. Y. 217; *Miller v. Garling*, 12 How. Pr. 203; *Ransom v. E. R. Co.*, 15 N. Y. 416; *Curtis v. R. R. Co.*, 18 id. 534; *Holyoke v. G. T. R. R. Co.*, 48 N. H. 41; *Bennett v. Lockwood*, 20 Wend. 223.)

Delos McCurdy for respondent. The fact that the plaintiff's furniture remained in the house and was leased with it forms but an incident to the contract and was not on a basis of the contract itself. (*Francis v. Cockrell*, L. R. [5 Q. B.] 501; *Carson v. Godley*, 26 Penn. St. 111; *Howard v. Doolittle*, 3 Duer, 464; *Dutton v. Gerrish*, 9 Cush. 89; *Foster v. Peyser*, id. 242; *Royce v. Guggenheim*, 106 Mass. 201; *Edwards v. N. Y. & H. R. R. Co.*, 98 N. Y. 245; *Murray v. Albertson*, 50 N. J. L. 167.) There was in this case no implied or express warranty, upon the letting of the house, that it was, or that it would continue to be, fit for the purpose for which it was let. (*Jaffe v. Hartau*, 56 N. Y. 398; *Mumford v. Brown*, 6 Cow. 475; *Westlake v. Degraw*, 25 Wend. 669; *Chadwick v. Woodward*, 13 Abb. [N C.] 441; *Coulson v. Whiting*, 14 id. 60-67; *Sutphen v. Seebass*, id. 68; *Edwards v. N. Y. & H. R. R. Co.*, 98 N. Y. 245; *Simons v. Seward*, 22 J. & S. 406; *Cleves v. Wilmoughby*, 7 Hill, 88-89; *Edwards v. N. Y. & H. R. R. Co.*, 89 N. Y. 249; *Wolf v. Kilpatrick*, 101 id. 146-152.) Where the landlord has created no nuisance himself, and none arises from the premises, no liability can be imposed upon him for nuisances created elsewhere by others over whom he has no

Opinion of the Court, per VANN, J.

control. (*Cohen v. Dupont*, 1 Sandf. 266; *Royce v. Guggenheim*, 106 Mass. 201; *Pendleton v. Dyett*, 4 Cow. 581; *Edwards v. N. Y. & H. R. R. Co.*, 98 N. Y. 245; *Wolf v. Kilpatrick*, 101 id. 148; *Gilhooley v. Washington*, 3 Sandf. 330; 4 N. Y. 217; *Townsend v. Gilsey*, 7 Abb. Pr. [N. S.] 59; *Ogilvie v. Hull*, 5 Hill, 52; *Egerton v. Paige*, 20 N. Y. 281; *Wood on Land. & Ten.* 801-804; *Mortimer v. Brunner*, 6 Bosw. 653-659.) The defendant cannot successfully contend that she had the right to abandon the premises and refuse to pay the rent she had covenanted to pay under chapter 345 of the Laws of 1860. (*Jackson v. Suydam*, 54 N. Y. 450; *Vann v. Rouse*, 94 id. 401.)

VANN, J. It is not claimed that any deceit was practiced or false representations made by the plaintiff as to the condition of the house in question, or its fitness for the purpose for which it was let. The defendant thoroughly examined the premises before she signed the lease and she neither ceased to occupy nor attempted to rescind until the last quarter of the term. Neither party knew of the existence of the offensive odors when the contract was made. They were not caused by the landlord and did not originate upon his premises, but came from an adjoining tenement. The lease contained no covenant to repair or to keep in repair, and no express covenant that the house was fit to live in. The defendant, however, contends that as the demise was of a furnished house for immediate use as a residence, there was an implied covenant that it was reasonably fit for habitation. It is not open to discussion in this state that a lease of real property only, contains no implied covenant of this character and that in the absence of an express covenant, unless there has been fraud, deceit or wrong-doing on the part of the landlord, the tenant is without remedy even if the demised premises are unfit for occupation. (*Witty v. Matthews*, 52 N. Y. 512; *Jaffe v. Harteau*, 56 N. Y. 398; *Edwards v. N. Y. & H. R. R. Co.* 98 N. Y. 245; *Cleves v. Willoughby*, 7 Hill, 83; *Mumford v. Brown*, 6 Cow. 475; *Westlake v. DeGraaf*, 25

Opinion of the Court, per VANN, J.

Wend. 669; Taylor's Landlord and Tenant [8th ed.], § 382; Wood's Landlord and Tenant, § 379.)

But it is urged that the letting of household goods for immediate use raises an implied warranty that they are reasonably fit for the purpose and that when the letting includes a house furnished with such goods, the warranty extends to the place where they are to be used. This position is supported by the noted English case of *Smith v. Marrable* (11 M. & W. 5), which holds that when a furnished house is let for temporary residence at a watering place, there is an implied condition that it is in a fit state to be habited and that the tenant is entitled to quit upon discovering that it is greatly infested with bugs. This case has been frequently discussed and occasionally criticised. It was decided in 1843, yet during that year it was distinguished and questioned by two later decisions of the same court. (*Sutton v. Temple*, 12 Mees. & Wels. 52; *Hart v. Windsor*, id. 68.) It was approved and followed in 1877 by *Wilson v. Hatton* [L. R.] 2 Exch. Div.] 336), in which, however, there was an important fact that did not appear in the earlier case, as before the lease was signed there was a representation made in behalf of the landlord that she believed "the drainage to be in perfect order," whereas, it was in fact defective and the contract was promptly rescinded on this account. The principle that there is an implied condition or covenant in a lease that the property is reasonably fit for the purpose for which it was let, as laid down in *Smith v. Marrable*, has been frequently questioned by the courts of this country, and has never been adopted as the law of this state. (*Edwards v. N. Y. & H. R. R. Co.* 98 N. Y. 248; *Howard v. Doolittle*, 3 Duer, 475; *Carson v. Godley*, 26 Penn. St. 117; *Dutton v. Gerrish*, 9 Cush. 89; *Chadwick v. Woodward*, 13 Abb. [N. C.] 441; *Coulson v. Whiting*, 14 id. 60; *Sutphen v. Seebass*, id. 67; *Meeks v. Bowerman*, 1 Daly 99.) We have been referred to no decision of this court involving the application of that principle to the lease of a ready furnished house and it is not necessary to now pass upon the question because the case under consideration differs

Opinion of the Court, per VANN, J.

from the English cases, above mentioned, in two significant particulars: 1st. It involves a lease for the ordinary period of one year, instead of a few weeks or months during the fashionable season. 2nd. The cause of complaint did not originate upon the leased premises, was not under the control of the lessor, and was not owing to his wrongful act or default. It was simply a nuisance arising in the neighborhood, but neither caused nor increased by the house in question. Hence we are not called upon in this case to decide whether a lease of a furnished dwelling contains an implied covenant against inherent defects either in the house or in the furniture therein, but simply whether the lease under discussion contains an implied covenant against external defects, which originated upon the premises of a stranger and were unknown to the lessor when he entered into the contract.

It is uniformly held in this state that the lessee of real property must run the risk of its condition, unless he has an express agreement on the part of the lessor covering that subject. As was said by the learned General Term when deciding this case: "The tenant hires at his peril and a rule similar to that of *caveat emptor* applies and throws on the lessee the responsibility of examining as to the existence of defects in the premises and of providing against their ill effects."

In *Cleves v. Willoughby*, (7 Hill 83, 86) Mr. Justice BEARDSLEY speaking for the court said: "The defendant offered to show that the house was altogether unfit for occupation and wholly untenable. The principle on which this offer was made, however, cannot, I think, be maintained. There is no such implied warranty on the part of the lessor of a dwelling house as the offer assumes. It is quite unnecessary to look at the common law doctrine as to implied covenants and warranties or to its modification by statute. (3 R. S. 594). That doctrine has a very limited application for any purpose to a lease for years and in every case has reference to the title and not to the quality or condition of the property. The maxim *caveat emptor* applies to the transfer of all property, real, personal and mixed and the purchaser generally takes the risk of its

Opinion of the Court, per VANN, J.

quality and condition, unless he protects himself by an express agreement on the subject."

In *O'Brien v. Capwell*, (59 Barb. 504.) the court declared that "as between landlord and tenant * * * where there is no fraud, false representations or deceit and in the absence of an express warranty or covenant to repair, there is no implied covenant that the demised premises are suitable or fit for occupation, or for the particular use which the tenant intends to make of them, or that they are in a safe condition for use."

In *Edwards v. N. Y. & H. R. R. Co.* (98 N. Y. 249), it was said in behalf of this court: "If a landlord lets premises and agrees to keep them in repair and he fails to do so, in consequence of which anyone lawfully upon the premises suffers injury, he is responsible for his own negligence to the party injured. * * If he creates a nuisance upon his premises and then demises them, he remains liable for the consequences of the nuisance as the creator thereof. * * But where the landlord has created no nuisance and is guilty of no willful wrong or fraud, or culpable negligence, no case can be found imposing any liability upon him for any injury suffered by any person occupying or going upon the premises during the term of the demise and there is no distinction stated in any authority between cases of a demise of dwelling-houses and of buildings to be used for public purposes. The responsibility of the landlord is the same in all cases. If guilty of negligence or other *delictum* which leads directly to the accident and wrong complained of, he is liable; if not so guilty, no liability attaches to him."

These quotations illustrate the strictness with which the courts have refused to imply covenants on the part of the lessor as to conditions under his control. What sound reason then is there for claiming that the law will imply a covenant as to conditions not under his control and with reference to which neither lessor nor lessee can reasonably be supposed to have contracted, as they knew nothing about them? The fact that personal property was in part the subject of the lease can have

Opinion of the Court, per VANN, J.

no bearing upon this question, because neither the furniture, nor the place provided for its use, was the cause of the unpleasant odors. They were not a part of the leased property, either real or personal, but were independent of it in origin and accidental in their effect. If smoke from a neighboring manufactory had blown through the windows, or gas had escaped from a leaky main in the street and entered the house, could the lessee have abandoned the premises, or have called upon the lessor to respond in damages? If any nuisance had existed in the vicinity without the landlord's agency or knowledge, but which materially lessened the value of the lease, upon whom would the loss fall? These questions suggest the danger of departing from the established rule as to implied covenants with reference to the condition of leased real property, simply because personal property is included in the lease. The furniture was not the basis of the contract, but a mere incident, and in law the rent is deemed to issue out of the realty. (Wood's Landlord and Tenant, [2d ed.] vol. 1, p. 128; *Newman v. Anderton*, 2 B. & P. [N. R.] 224; *Emott's Case*, Dyer. 212 b.) The difficulty is still more serious when the effort is made to extend the contract of the lessor, by implication only, to causes having only an accidental connection with the property leased, whether real or personal.

We do not think that there was any covenant in the lease in question, implied either by common law or from the acts or relations of the parties, that extended to the grievance of which the defendant complains.

The judgment should, therefore, be affirmed with costs.

All concur.

Judgment affirmed.

Statement of case.

CATHARINE DRAPER, Appellant, v. THE PRESIDENT, MANAGERS
AND COMPANY OF THE DELAWARE AND HUDSON CANAL COM-
PANY, Respondents.

Plaintiff shipped certain goods, by defendant's road, to be transported from B. to A., consigned to herself. By the bill of lading it was provided that upon the arrival of the goods at the place of destination, and when "placed upon the platform or in the storeroom of the company * * * awaiting delivery there to the consignee * * * or to be taken from the car by the consignee," the goods shall be held by defendant "under the liability of a warehouseman and not as a carrier." *Held*, that under the bill of lading defendant had the option on arrival of the goods to retain them in the car, or to place them in its warehouse, and in either case its liability as a common carrier ceased after the consignee had had a reasonable time to call for and remove them. Plaintiff did not reside in A., and was not there when the goods arrived; some days after, her agent called at the defendant's freight-house in that place and was informed that they had arrived and had been unloaded; he expressed regret at the unloading, as he contemplated their removal to another place and asked to have them stored for a few days, to which the freight agent assented. The goods had not in fact been unloaded, but were in a car standing near the freight depot; they were left in the car for about twelve days thereafter, when they were destroyed by fire. In an action to recover for the loss, *held*, that whether the goods were held under the bill of lading or under the arrangement made by plaintiff's agent, in either case defendant was liable as warehouseman not as carrier; that as warehouseman it was liable only in case of negligence on its part, causing the fire or in the care of the goods after the fire commenced; that upon this question the burden of proof was upon plaintiff; and that, as her evidence failed to show negligence, she was properly non-suited.

(Argued December 9, 1889; decided December 20, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made November 16, 1886, which affirmed a judgment in favor of defendant, ordered upon the trial in the County Court.

The nature of the action and the facts are sufficiently stated in the opinion.

Amasa J. Parker for appellant. The goods were in the possession and care of the defendant as a common carrier and

Opinion of the Court, per HAIGHT, J.

not as a warehouseman at the time they were destroyed by fire. (*Edsall v. Camden*, 50 N. Y. 661; 14 Wend. 225; 45 N. Y. 578; 11 Wend. 305; 2 Kent's Com. 604; Edwards on Bailments, § 615; *Nelson v. H. R. R. Co.*, 48 N. Y. 498; Redf. on Carriers, § 52; *Miller v. Steam Co.*, 10 N. Y. 437; Angell on Carriers, § 156.) The non-suit was wrong, as there was abundant evidence of negligence to require a submission of the case to the jury. (*Jones v. Morgan*, 90 N. Y. 4; Abb. Trial Ev., 555; Wharton on Neg., § 422; 107 Mass. 334; 11 Pick. 41; Story on Bailments, § 529; Angell on Carriers, § 472; *National Bank v. City Bank*, 103 U. S. 658; *Hart v. H. R. R. Co.*, 80 N. Y. 622; *Bernhard v. R. & S. Co.*, 1 Abb. Ct App. Dec. 131; *Keller v. N. Y. C. R. R. Co.*, 2 id. 480; *Wohlfiel v. S. A. R. Co.*, 38 N. Y. 49; *Cook v. N. Y. C. R. R. Co.*, 1 Abb. Ct. App. Dec. 432; *Tanner v. N. Y. C. & H. R. R. Co.*, 21 Wkly. Dig. 396.) The defendant is also liable upon the ground that twenty days was an unreasonable time to delay delivering the goods at the warehouse, and plaintiff had the right to submit that question to the jury. (*Rawson v. Holland*, 59 N. Y. 611; *Read v. Spaulding*, 30 id. 630.)

Edwin Young for respondent. The motion for a non-suit was properly granted upon the grounds stated. (44 N. Y. 505; 54 id. 214; 49 id. 223; 34 id. 548; 87 id. 413; 39 Ill. 335; 49 N. Y. 224; 9 id. 463; 15 id. 524; 38 id. 442; 56 id. 302; 53 id. 654; 49 id. 47; 49 id. 223; 97 id. 259; 87 id. 413; 51 id. 61; 46 id. 271; 25 id. 442; 71 id. 180; 48 id. 498; 59 id. 258; 24 How. Pr. 290; 1 Daly, 227; 3 Wall. 106.)

HAIGHT, J. This action was brought to recover the value of a quantity of household goods and furniture which was destroyed by fire.

On the 6th day of February, 1885, the plaintiff shipped the goods and furniture in question by the defendant at Binghampton, to the city of Albany. The goods so shipped arrived in

Opinion of the Court, per HAIGHT, J.

Albany in due course of time and were left in the car in which they were shipped until the first day of March thereafter at which time they were destroyed by fire.

The first question which it becomes necessary for us to consider is as to whether the defendant can be held liable as a common carrier. It appears that at the time the goods were received at Binghamton for shipment the defendant issued to the plaintiff or her husband, who was there acting for her as her agent, a bill of lading in which the plaintiff's name was entered as "Mrs. Wm. Draper, Albany," in the usual place for the consignee, and by which the defendant undertook to transport the goods from Binghamton to its warehouse at Albany. Upon the back thereof there was printed conditions and rules forming a part of the contract, one of which provides as follows: "When goods arrive at the place to which they are to be carried over this line and are placed on the platform, or in the store-room of the company, according as the usage of business may require, awaiting delivery there to the consignee at such place, or to other carriers for transportation to points beyond the line of this company, or to be taken from the car by the consignee, it is to be deemed a part of the contract that said goods shall be held in either case by this company under the liability of a warehouseman and not as a carrier." It will be observed that under this provision, the defendant becomes liable as a warehouseman, and not as a carrier after the goods have arrived at their place of destination and are placed on the platform or in the store-room of the company, or to be taken from the car by the consignee. The contract or the bill of lading does not specify what shall be done with the goods upon their arrival at the defendant's warehouse in Albany. The company, therefore, had its option to retain them in the car, to be taken from it by the consignee, or to remove the goods from the car and place them in the store-house, and in either case, the liability of the defendant as a common carrier would cease after the consignee had a reasonable time to call for and remove them. (*Fenner v. B. & S. L. R. R. Co.*, 44 N. Y. 505.)

Opinion of the Court, per HAIGHT, J.

Prior to this time the plaintiff had resided in Binghamton. She contemplated moving to the city of Albany, and had consequently caused the goods to be shipped to that place to herself as consignee. She was not present at the time the goods arrived, and did not at that time have a place of residence in Albany, so that she could be notified of their arrival.

It further appears that three or four days after the goods were shipped, her husband left Binghamton, going to the city of Utica, where he remained for two or three days, and then went to the city of Albany, and that in the fore part of the following week, or about the sixteenth of the month he called at the defendant's freight-house and inquired of the man in charge if the goods had arrived, and was informed that they had. He then asked if they had been unloaded from the car, and was informed that they had. He then remarked that he was sorry; that he did not know but he should have a situation in Utica, and should ship them to that place, and asked that they be stored for a few days until he could determine whether he should go to Utica, and offered to pay for such storage, and the man in charge informed him that he could leave them. The agent in charge was mistaken in reference to the goods having been unloaded. The car in which the goods were shipped was placed upon the track next to the platform of the freight depot, at the end thereof, so that the goods could be unloaded onto the platform or taken from the car by trucks from the opposite side, and there the car remained from the time of its arrival until the first of March, the time of its destruction. We are unable, however, to see how this affects the question for, when Draper, the plaintiff's husband, was informed that the goods had been unloaded, he expressed himself as being sorry that they had been, in view of his then contemplated removal to Utica. This would justify the defendant's agent in retaining the goods in the car after finding that he was mistaken in reference to their being unloaded. So, that whether the goods were held under the bill of lading or under the arrangement made by the plaintiff's husband at his interview with the freight agent alluded to, in either

Opinion of the Court, per HAIGHT, J.

case the defendant would only be liable as a warehouseman, and not as a carrier.

The question as to whether the defendant is liable as a warehouseman depends upon the question as to whether or not the fire originated through the negligence of the defendant, its agents or servants; or whether they were negligent in reference to the care of the plaintiff's property after the fire had commenced. Upon this question the burden was upon the plaintiff. The cause or origin of the fire is not disclosed. It does not distinctly appear where the fire broke out. Mr. Wadsworth, who was at the time the defendant's freight agent, testified that he was in the office of the freight-house at the time and believed that he first discovered the fire. He was sitting at his desk and saw smoke coming over the building past his window which he thought was more than would naturally come from the chimney. He thereupon directed Mr. Smith, one of the clerks, to step out of the door and see where the smoke came from and he did so, coming back and reporting that he believed the freight-house was on fire. The witness then rushed out himself and saw that the freight-house was on fire and caused the alarm to be sounded. He then looked again to locate the fire more carefully and saw the smoke rolling over pretty heavy from the building that was 200 or 250 feet away; that there was a very dense smoke, and he believed the fire originated in the lower end of the adjoining building, a building that ran at right angles with the buildings alongside of which the goods were placed, a different building from the main building. He then went to the yard where the engines were and set them to work getting the cars away from the building that was on fire and then came back and told the men to get their piles of papers together and get them out of the building. It does not distinctly appear whether the building in which he believed the fire originated and which was at right angles with the freight-house belonged to or was under the control of the company or not, so that we are left in ignorance as to the cause or origin of the fire or as to whether it broke out from the inside or outside of the building. The case

Opinion of the Court, per HAIGHT, J.

consequently fails to show negligence in reference to the commencement of the fire. (*Whitworth v. Erie R. Co.*, 87 N. Y. 413).

It appeared that there was a train of freight cars standing upon the track alongside of the freight-house; that these cars were hitched onto by an engine and drawn away; but that two cars, in one of which the plaintiff's goods were stored remained upon the track, they not being coupled onto the train that was drawn out. That shortly after the arrival of the fire department, hose were laid across the track for the purpose of conducting the water to the burning building and that thereafter the cars could not be run out over the hose without cutting them in two. One car, however, it appears was gotten out by raising the hose up over the top of the car. There was testimony to the effect that very shortly after the alarm was sounded and within about ten minutes the freight-house and the car in which these goods were stored were on fire and that the heat became very intense, so that they could not be approached with safety. The chief evidence relied upon as tending to show negligence in not saving this car was given by the witness Kingsbury. He testified that he reached the fire in about three minutes after the alarm was sounded; that the long freight-house at the end of Gansevoort street was then on fire; that there were locomotives around there which were standing upon the tracks; that they were not making any efforts at that time to get the cars off from the Church street track; that there were men there that he took to be railroad men and he spoke to one or two of them saying: "You want to get these cars out of here because the depot is going;" that there seemed to be quite a number of men there that looked like workmen and they were directing them about getting the books and different things out of the building; that there was a man directing them about the books; that the witness spoke to him, he told him that the freight-house was going and that he had better see about getting the cars away and that he did not seem to do anything about it. Upon the cross-examination he testified, however, that he was unable to

Statement of case.

recognize the man who seemed to be engineering or telling the other men what to do; that they were engaged in getting the books and trying to save their effects, their records and things, and were pretty actively engaged; that they were all flying around trying to save what they could.

When we take into consideration the magnitude and rapidity of the fire, the dense smoke and intense heat with the vast amount of property in its immediate vicinity to be saved, we are inclined to adopt the view of the trial court to the effect that the evidence produced did not establish negligence in the failure of the defendant's agents and servants to save the car from the fire.

The judgment should therefore be affirmed with costs.

All concur, except VANN, J., who dissents upon the ground that there was enough evidence of negligence to require the submission of the case to the jury upon the last question discussed in the opinion.

Judgment affirmed.

CHARLES E. HOVEY et al., Appellants v. JOHN ELLIOTT et al,
Respondents.

One McD. contracted to pay plaintiffs for their services in prosecuting a certain claim, twenty-five per cent of the award obtained, the payment of which was by the contract declared to be a lien upon the claim and upon any draft, money or evidence of indebtedness which might be paid or issued thereon. An award was made in favor of McD.; who assigned it to W. Plaintiff thereupon commenced a suit to restrain McD. and W. from disposing of, collecting or receiving more than three-fourths of the award and for a decree establishing plaintiff's lien. An order was made appointing R. receiver with directions to collect the award and to invest a portion in certain bonds to be held to await the result of the action. A demurrer to plaintiff's bill was sustained and the bonds so held were ordered to be handed over by R. to McD. and W. who transferred them to R. & Co., of which firm R. was a member. R. & Co. surrendered the bonds for new ones which they sold in the market. Meanwhile, the decree dismissing the bill was reversed on appeal and the case remanded to the Special Term with leave to the defendants to answer which they

118	124
140	378

118	124
166	390

Statement of case.

did. Having failed to pay into court in accordance with its direction, to the credit of the suit, the amount of the award claimed by the plaintiffs, defendants' answer was stricken out and a decree taken *pro confesso* against them, adjudging that they should pay to plaintiffs the amount claimed and that the latter have a lien therefor as provided by the contract. Plaintiffs thereupon, more than six years after the reversal of the decree dismissing the complaint, but within six years after the final decree, commenced this action to recover said amount against the surviving partners of R. & Co. The court below held that plaintiffs had a remedy by action at law against the defendants arising on the sale of the bonds as against which the statute of limitations began to run at a time not later than that of the reversal of the decree dismissing the plaintiff's case and that their right of action was barred. *Held*, (FOLLETT, Ch. J., HAIGHT and BROWN, JJ., dissenting), error; that defendants' firm having purchased the bonds *pendente lite*, charged with knowledge of plaintiff's claim, they were bound by the result as effectually as if they had been made parties thereto, and for the purposes of the lien might be deemed to have held the bonds, and upon sale thereof, to hold the proceeds in trust for plaintiffs; that when the decree was obtained they were bound to pay plaintiffs from the proceeds of sale an amount sufficient to satisfy their lien, and concurrently in time with the arising of such duty the right to demand its performance accrued; that prior to said decree plaintiff's lien was simply equitable to be enforced only by suit in equity; that, therefore, during the pendency of the former action, the statute of limitations did not run.

Haie v. O. N. Bk. (64 N. Y. 550); *Husted v. Ingraham* (75 id. 251.) *Pierson v. McCurdy* (100 N. Y. 608), distinguished.

Hovey v. Elliott (21 J. & S. 331), reversed.

(Argued June 21, 1889; decided January 14, 1890.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made May 12, 1886, which affirmed a judgment in favor of defendants, entered upon the report of a referee.

This action was commenced April 16, 1884; the relief asked being that defendants should be declared trustees of certain bonds for the benefit of plaintiffs, and the latter should be held to have a lien upon and a right to such bonds, and that defendants should account for the same. The answer set up the statute of limitations as a defense. The trial court sustained this defense and dismissed the complaint.

Further facts appear in the opinions.

Statement of case.

Thomas M. Wheeler and Herbert B. Titus, for appellants. The lien of the plaintiff's "upon the claim of McDonald, and upon any draft, money, evidence of indebtedness or the proceeds thereof," was not destroyed. (*Tilton v. Coffield*, 93 U. S. 168; *Leitch v. Wells*, 48 N. Y. 601; *Comstock v. Hier*, 73 id. 278; *Farwell v. I. Nat. Bank*, 90 id. 489; *Ellett v. Tyler*, 41 Ill. 449.) There is no such action as an action for damages for the destruction of an equitable lien. (*Anthony v. Slaid*, 11 Metc. 291; 1 Chitty on Pleading, 3; *Forbes v. Moffatt*, 18 Ves. Jr. 394; Hill on Trustees, 547; Pomeroy's Eq. Juris. § 132; *Alner v. George*, 1 Camp. 392; 11 How. [U. S.] 675; 99 U. S. 388; 21 Fed. Rep. 82; 1 Johns. Ch. 520; *Reubens v. Joel*, 13 N. Y. 498; *Goulet v. Asseler*, 22 id. 228; *Gould v. C. C. Nat. Bank*, 86 id. 83; *Hale v. Omaha Bank*, 49 id. 632; *Allison v. Abendroth*, 108 id. 470; Sedgwick on Dam. 31; Sutherland on Dam. 2-3; Weeks' Damnum Absque Injuria, § 4.) If there be such an action, such cause of action would not accrue until damages had been sustained. (Wood's Stat. of Lim. 364; *Daniels v. Newton*, 114 Mass. 539; *Mather v. Green*, 17 id. 60.) If an action could be maintained, the six years limitation, as prescribed by the Code of Civil Procedure, does not apply. (Code Civ. Pro. § 3343, subdiv. 7; 2 Blackstone's Com. 396; *Sheldon v. Sill*, 8 How. [U. S.] 449; *Gillett v. Fairchild*, 4 Denio, 82; 1 Parsons on Contracts, § 223; *Meany v. Head*, 1 Mass. 319; *O. Nat. Bank v. Aicott*, 46 N. Y. 17; *Lickbarrow v. Mason*, 6 East. 21, 27; Pomeroy's Eq. Juris. §§ 1234, 3343; *Jackson v. Parker*, 9 Cow. 81; Overton on Liens, § 1; Bouvier's Law Dict; *S. F. & M. Ins. Co. v. Allen*, 43 N. Y. 395; *Wynehamer v. People*, 13 id. 396; *Daubigny v. Duval*, 5 T. R. 606; *Holley v. Huggeford*, 8 Pick. 76; *Legg v. Evans*, 6 M. & W. 41; Code Civ. Pro. § 644; *Thurber v. Blanck*, 50 N. Y. 80; *Anthony v. Wood*, 96 id. 185.) The plaintiff's cause of action is to enforce against the defendants their liability as *pendente lite* purchasers, and is founded on the decree. (*Bishop of Winchester v. Paine*, 11 Ves. 197; *Gaskell v. Durbin*, 2 Ball & Beat. 169; *Tilton v. Coffield*, 93 U. S. 168; *Leitch v. Wells*, 48 N.

Statement of case.

Y. 601; *Harrington v. Slade*, 22 Barb. 165; *Ex parte R. R. Co.* 95 U. S. 226; 4 Wait's Act. & Def. 189; *Fletcher v. Farrell*, 9 Dana, 372.) By the contract between Hovey and McDonald, a trust upon the award was created, and McDonald became a trustee. When McDonald obtained possession of the bonds, he held them as trustee for Hovey. And Riggs & Co., by the purchase of the bonds, with notice of the trust, became themselves trustees, and liable to execute the trust; and that liability continues, although they have sold the trust property, and even if they had disposed of the proceeds. (Snell on Equity [Am. ed.] 307; Story's Eq. Juris. § 1231; Lewin on Trusts, 748, § 8; *Fisher v. Fields*, 10 Johns. 508; *Clark v. Southwicks*, 1 Curtis, 497; *Legard v. Hodges*, 1 Ves. 477; 1 Eq. Cas. Abr. 384; *Adair v. Shaw*, 1 Sch. & Lef. 262; *Gray v. Lewis*, L. R. [8 Eq. Div.] 543; *Earl Powllet v. Herbert*, 1 Ves. 297; *Findon v. Parker*, 11 M. & W. 775; *Matins v. Freeman*, 4 Bing. 395, *Daley v. Thompson*, 10 M. & W. 317, 318; *Ryan v. Blanks*, 4 B. & Ald. 401; Broom's Legal Max. 209; Story's Eq. Juris. § 453.) Equity will follow trust property or property charged with a lien, into whosever hands it may come, with notice of the trust or lien, and will enforce the payment of the trust out of any property he may have, by a personal judgment, if necessary. (*Root v. R. R. Co.* 105 U. S. 215; *Norton v. Hixon*, 25 Ill. 453; *Carter v. Lipsey*, 70 Ga. 417; *Sheppard v. Taylor*, 5 Peters, 676; *Kuatchbull v. Hallett*, L. R. [13 Ch. Div.] 717, 729, 730; 5 Cent. L. Jour. 51, 75.) The defendants are estopped from denying that plaintiffs have a lien upon the proceeds of the bonds in their hands. (Freeman on Judgments, § 249.) No cause of action accrued to the plaintiffs against the defendants until the rendition of the final decree of the Supreme Court of the District of Columbia against their assignors, McDonald and White, on April 17, 1878. (57 N. Y. 627; 1 DeG. & J. 578; 2 Ball. & Beat. 169; 11 Ves. 197; 2 Johns. Ch. 444; 93 U. S. 168; 2 Dr. & W. 362; 95 U. S. 226; 105 Ind. 79; *Harrington v. Slade*, 22 Barb. 165; *Talbot v. Bell*, 5 B. Mon. 320, 326; *Blevins v. Alexander*, 4 Sneed, 497;

Statement of case.

Nickerson v. Babcock, 29 Ill. 497; 1 Wait's Act. & Def. 41; 2 id. 119; *Tappan v. Whittemore*, 15 Blatchf. 441; *Gibson v. Choteau*, 13 Wall. 100; *Lynch v. Bernal*, 9 id. 325; *Montgomery v. Hernandez*, 12 Wheat. 134; *Graves v. Coutant*, 31 N. J. [Eq.] 781; *Taylor v. Taylor*, 43 N. Y. 584; *Trecothick v. Austin*, 43 Mas. 16; *Rice v. Hosmer*, 12 Mass. 126; *Walden v. Bodley*, 9 How. [U. S.] 48; *Webb v. Barnwell*, 116 U. S. 193; Angell on Lim. § 215; *Borer v. Chapman*, 119 U. S. 602.) Riggs & Co. can set up no defense to this action that could not be set up by their assignors, McDonald and White. (48 N. Y. 601; 2 Story's Eq. Juris. 908.) The Code of Civil Procedure alone determines the period of limitation applicable to any action. (2 R. S. 301; Laws of 1880, chap. 254; Code Civ. Pro., § 414.) Even if plaintiff had an adequate remedy at law, it is not available as a defense in this action, as it was not pleaded in the answer; and no judgment can be rendered except in equity, and upon the cause of action stated in the complaint. (*Town of Mentz v. Cook*, 108 N. Y. 508; *Comes v. Harris*, 1 id. 226; *Bell v. Merrifield*, 109 id. 207; *Romeyn v. Sickles*, 108 id. 652; *Wheelock v. Lee* 74 id. 500; *Graham v. Read*, 57 id. 681; *Cole v. Reynolds*, 18 id. 76; *Wright v. Hooker*, 10 id. 59; *Bailey v. Ryder*, 10 id. 368, 370.) The action for money had and received is an equitable action. (*United States v. Westborough*, Davies [U. S.] 154; 4 Wait's Act. & Def. 469; *Buel v. Boughton*, 2 Den. 91; *Colville v. Besley*, id. 142.) The limitation applicable to an equitable action is ten years. (*Brinkerhoff v. Bostwick*, 99 N. Y. 198.) And the cause of action would not accrue until final judgment establishing plaintiff's lien. (4 Wait's Act. & Def. 470.) In any event, in order to maintain the action, there must be money in the defendants' hands to which the plaintiff is immediately entitled. (4 Wait's Act. & Def. 470; *Butterworth v. Gould*, 41 N. Y. 451; *Cronin v. Patrick Co.*, 4 Hughes, 524; *Combs v. Hodge*, 21 How. [U. S.] 397, 406; Burroughs on Pub. Sec. 252; *Scotland County v. Hill*, 112 U. S. 185.) Although the defendants may have purchased the bonds in good faith, as a matter of fact, yet, in equity, the

Statement of case.

purchase was a fraud upon the plaintiff's rights. (*Green v. White*, 7 Blatchf. 244; *Murray v. Finster*, 2 Johns. Ch. 157; *Willoughby v. Willoughby*, 1 Term Rep. 767; *LeNeve v. LeNeve*, 3 Atk. 654; *Bushnell v. Bushnell*, 1 S. & L. 100; 1 Story's Eq. Juris. 333, 395; *Smith v. Cottrell*, 94 Ind. 397.) No cause of action accrued until the action could have been maintained. And until the controversy between Hovey and McDonald, upon the contract, had been determined, Hovey could not have maintained an action against defendants *without making McDonald a party*. (1 McAlister [U. S.] 37; 17 How. [U. S.] 141; Mitf. & Tyler's Pl. 20; *Mallow v. Hinde*, 12 Wheat. 195; *Peyser v. Wendt*, 87 N. Y. 325; *O. L. & D. Co. v. Price*, 87 id. 548; *Field v. Mayor, etc.*, 6 id. 187; *Seymour v. R. R. Co.*, 25 Barb. 302; *Brinckerhoff v. Bostwick*, 99 N. Y. 193.)

Wm. D. Shipman for respondents. The plaintiffs' cause of action, is either an action upon an implied contract obligation or liability, within the meaning of the subdivision 1, or an action to recover damages for an injury to property, within the meaning of subdivision 3, of section 382 of the Code of Civil Procedure, and is, therefore, barred in six years after the cause of action accrued. (*Pierson v. McCurdy*, 33 Hun. 520; 100 N. Y. 608; 22 Wkly Dig. 253; *Hatch v. Cobb*, 4 Johns. Ch. 559; *Kempshall v. Stone*, 5 id. 193; *Morss v. Elmendorff*, 11 Paige, 287; *Clarke v. R. R. R. R. Co.* 18 Barb. 356; *Marquat v. Marquat*, 12 N. Y. 336; *Phillips v. Gorham*, 17 id. 270; *N. Y. I. Co. v. N. W. Ins. Co.* 23 id. 357, 360; *Carr v. Thompson*, 87 id. 162, 2 R. S. 301; *Borst v. Corey*, 15 id. 509; Wood on Lim., § 232; *Diefenthal v. Mayor, etc.* 111 N. Y. 338; Code Civ. Proc., §§ 382, 3343; *Carr v. Thompson*, 87 N. Y. 160; *Drake v. Wilkie*, 30 Hun. 537; *Butler v. Johnson*, 111 N. Y. 217, 218; *People v. Haines*, 49 N. Y. 587; *Arnold v. H. R. R. R. Co.* 55 id. 661; *Astor v. Hoyt*, 5 Wend. 605; *Erwin v. U. S.*, 97 U. S. 392; 31 Ky. 559; *Ins. Co. v. Stimson*, 93 U. S. 30; *Phelps v. McDonald*, 99 U. S. 302; *Comegys v. Vasse*, 1 Pet. 195;

Statement of case.

Gregory v. Morris, 96 U. S. 623; *Husted v. Ingraham*, 75 N. Y. 259; *Beall v. White*, 94 U. S. 386; *Fowler v. Rapley*, 15 Wall. 335, 336; 2 Story's Eq. Juris., § 1216; 2 Kent's Comm. 634; *Kirkman v. Shawcross*, 6 Term. Rep. 14; *Yates v. Joyce*, 11 Johns. 136; *Lane v. Hitchcock*, 14 id. 213; *Van Pelt v. McGraw*, 4 N. Y. 110; *Manning v. Monaghan*, 23 id. 539; *Husted v. Ingraham*, 75 id. 259; *Read v. Markle*, 3 Johns. 523; *Morgan v. Plumb*, 9 Wend. 287; Angell on Lim., § 188; *Dunn v. Hornbeck*, 72 N. Y. 89; 2 Story Eq. Jur. § 1521; *Kennedy v. Greene*, 3 Myl. & K. 722; *Wood v. Carpenter*, 101 U. S. 141; *Bailey v. Glover*, 21 Wall. 342; *Hoyt v. Sprague*, 103 U. S. 637; *Murray v. Ballou*, 1 John. Ch. 566; *County of Warren v. Marcy*, 97 U. S. 105, 106; *Murray v. Lylburn*, 2 John. Ch. 441; *Murray v. Finster*, 2 id. 155; *Heatley v. Finster*, id. 158; Bigelow on Estop. [3d ed.], 60; Wade on Notice, § 375; *B'k of Columbia v. Patterson*, 7 Cranch, 303; *Shelton v. Johnson*, 4 Sneed 672; *Holbrook v. N. J. Z. Co.*, 57 N. Y. 625.)

John Selden for respondents. Neither Mr. Elliot nor his copartners, were bound in *personas*, by the decree of April 17, 1878. (Thompson's Dig. Laws, D.C. 289-290; *Diggs v. Eliason*, 4 Cranch. 619; *Jackson v. Bk. U. S.*, 5 id. 1; *Thompson v. Beveridge*, 3 Mackey, 170; Bigelow on Estoppel [3d ed.], 60; Wade on Notice, § 375.) The recovery of the decree of April 17, 1878, was no condition precedent to the prosecution by the plaintiffs of an action against Riggs & Co. (R. S. U. S., § 1069; Act Cong. March 3, 1887, § 1; 24 Stat. 505; Story Eq. Pl., § 156; 1 Dan. Ch. [5th Am. ed.] 281.) The plaintiffs have no cause of action against the defendant, upon or under the decree of April 17, 1878. (Code Civ. Pro., § 376.) The lien of the plaintiff upon the bonds was personal property. (*Sonlard v. U. S.*, 4 Pet. 512; *People v. N. Y. & M. B. R. Co.*, 84 N. Y. 569; *Erwin v. U. S.*, 97 U. S. 396; *Gunn v. Barry*, 15 Wall. 622, 623; *Ins. Co. v. Stimson*, 103 U. S. 30.) An injury to the interest of the plaintiffs, as leinors, in the bonds or their proceeds, was an actionable injury within the defini-

Statement of case.

tions contained in section 3343 of the Code. (*Weatherhead v. Baskerville*, 11 How. [U. S.] 358; *Phelps v. McDonald*, 99 U. S. 303.) An action for damages lies for the injury or destruction of a lien, whether legal or equitable. (*Peck v. Jenness*, 7 How. [U. S.] 620; *Smith v. Plummer*, 1 Barn. & Ald. 582; 2 Story Eq. Juris., § 1216; 2 Kent's Com. 634; *Kirkland v. Shawcross*, 6 Term Rep. 14; *Beall v. White*, 94 U. S. 386; *Fowler v. Rapley*, 15 Wall. 335-336; 4 Kent's Com. [11th ed.] 161; 2 Jones on Mortgages, § 696; Jones on Chattel Mortgages [2d ed.] § 447; Jones on Pledges, § 434; *Pierson v. McCurdy*, 33 Hun, 529; *Bayne v. U. S.*, 93 U. S. 643; *U. S. v. State Bk.*, 96 id. 35; *Nash v. Torone*, 5 Wall. 702.) Since the plaintiffs have a remedy, if any, at law, their remedy, if any, in equity must be governed by the limitation applicable to their remedy at law. (*Clarion Bk. v. Jones*, 21 Wall. 339; *Haywood v. Nat. Bk.*, 96 U. S. 614; *Litchfield v. Ballou*, 114 id. 193; 2 Story's Eq. Juris., §§ 1215-1217; *Pierson v. McCurdy*, 33 Hun, 533; *Speidel v. Henrich*, 120 U. S. 386; *U. S. v. Beebe*, 127 id. 347.) The plaintiffs were without remedy, in a court of equity, against the firm of Riggs & Co. (*Parkersburg v. Brown*, 106 U. S. 500; *Litchfield v. Ballou*, 114 id. 192; *Buzard v. Houston*, 119 id. 353, 355.) Limitation at law runs from the time that the action might have been commenced. (*Hoyt v. Sprague*, 103 U. S. 637; *Wilcox v. Plummer*, 4 Pet. 181; *Army v. Dubuque*, 98 U. S. 474; *Scoville v. Thayer*, 105 id. 153; *Phelps v. Elliott*, 35 Fed. Rep. 455, 462; *Kenney v. Robinson*, 52 Mich. 393; Story Eq. Pl., § 742; *Bowne v. Joy*, 9 Johns. 221; *Walsh v. Durkin*, 12 id. 99; *Stanton v. Embrey*, 93 U. S. 554; *Ins. Co. v. Brune*, 96 id. 592; Banning on Lim. 29, 270; Wood on Lim., § 177; 1 Robinson's Practice, 484, 485, 504; *Read v. Markle*, 3 Johns. 523; *Morgan v. Plumb*, 9 Wend. 287.) Limitation began to run against any cause of action by the plaintiffs against Riggs & Co. at least as early as the 4th day of March, 1876, when the obstacle, if any, arising from the decrees passed by the Special Term in *Hovey v. McDonald*, was removed by the reversal of those decrees in

Opinion of the Court, per BRADLEY, J.

the General Term. (*Phelps v. Elliott*, 29 Fed. Rep. 54.) The cause of action, if any, of the plaintiffs, is governed and barred by the limitation of six years prescribed in subdivision 3 of section 382 of the Code of Civil Procedure. (Angell on Lim., § 188; *Dunn v. Hornbeck*, 77 N. Y. 89; *New Albany v. Burke*, 11 Wall. 107; *Kennedy v. Greene*, 3 M. & K. 722; *Wood v. Carpenter*, 101 U. S. 141; *Hoyt v. Sprague*, 103 id. 637; *Marsteller v. McClean*, 9 Cranch. 159.)

BRADLEY, J. The case was determined by the court below in favor of the defendants upon the defense of the statute of limitations. And that is the main question for consideration upon this review.

By the contract, between the plaintiffs and McDonald, they were to have, for their services in aiding him in the prosecution of his claim before the mixed commission on British and American claims, a sum equal to twenty-five per cent of the amount which should be allowed or awarded to him. And in their behalf "the payment of the said sum of twenty-five per cent was to be made a lien upon the claim, and upon any draft, money or evidence of indebtedness which might be paid or issued thereon."

After the award was made in favor of McDonald for \$197,190 in gold, he assigned it to White, and thereupon, and while the award yet remained in the hands of the diplomatic representatives of the British Government, the plaintiffs filed their bill against McDonald and White, in the Supreme Court of the District of Columbia, to restrain them from disposing of, collecting or receiving more than three-fourths of the amount of the award, and for a decree establishing the plaintiffs' lien, and a temporary injunction was issued in their behalf. Upon an order being made to that effect, and appointing George W. Riggs receiver, a portion of the fund was paid over to White, as assignee of McDonald, and the balance was taken by the receiver, with directions to invest it in a certain class of bonds of the District of Columbia, which he did. The defendants' demurrer to the plaintiff's bill having been afterward sustained

Opinion of the Court, per BRADLEY, J.

and decree entered dismissing the bill, the court ordered that the bonds held by the receiver be handed over to McDonald and White, which was done, and thereupon they transferred them for value to Riggs & Co., of which firm George W. Riggs was a member, and the firm thereupon surrendered those bonds and procured new ones to be issued to it, and afterwards sold them in the market to divers purchasers. In the mean time, the plaintiffs had taken an appeal to the General Term of the Supreme Court of the District of Columbia, from the decree, dismissing their bill of complaint, and it was reversed in March, 1876, and the suit remanded to the Special Term, with leave to the defendants therein to answer, which they did. And those defendants having failed to pay into court to the credit of the suit, the sum of \$49,297.50, as directed by its order, their answer was stricken out and from the files, and decree was taken *pro confesso* against the defendants, and on the 17th day of April, 1878, a decree absolute was made, by which it was adjudged that McDonald and White pay to the plaintiffs the sum of \$49,297.50, and that the latter have a lien upon the claim of McDonald, against the United States, as awarded by the mixed commission on British and American claims and upon any draft, money, evidence of indebtedness or the proceeds thereof, with interest from April 17, 1878, This action was brought within six years after the decree last mentioned was made, and more than six years after such reversal of the decree dismissing the complaint.

The court below held that the statute of limitations commenced to run from a time not later than the time of such reversal, and holding that plaintiffs had a remedy by action at law against the defendants resulting from that sale, concluded that the right of action was barred on the expiration of six years. The defendants firm having purchased the bonds of McDonald and White or one of them *pendente lite*, charged with knowledge of the pending action and its purpose, were bound by the result of the litigation in the suit against McDonald and White as effectually as if they had been parties to it, so far as related to the lien of the plaintiffs upon the

Opinion of the Court, per BRADLEY, J.

property. (1 Story Eq. Jr. § 405; *Heatley v. Finster*, 2 John. Ch. 158; *Murray v. Lyburn*, id. 441; *Jackson v. Stone*, 13 John. 447; *Jackson v. Losee*, 4 Sandf. Ch. 381; *Tilton v. Cofield*, 93 U. S. 163; *Clark v. Farrow*, 10 B. Monroe, 446; 52 Am. Dec. 552; *Shelton v. Johnson*, 4 Sneed, 672; *Stone v. Connelly*, 1 Met. [Ky.] 652; 71 Am. Dec. 499; *Green v. Rick*, 121 Penn. St. 130; 6 Am. St. R. 760.

And for the purpose of the lien the defendants may be deemed to have held the bonds taken from McDonald and White and the re-issue to them, in trust for the plaintiffs while they had them, (*Murray v. Ballou*, 1 John. Ch. 566); and in like manner the proceeds of the sale, (2 Perry on Trusts, § 838; *Sadler's Appeal*, 87 Penn. St. 154; *Pennell v. Deffell*, 4 DeGex. M. & G. 372; *Knatchbull v. Hallett*, L. R. 13 Ch. Div. 696; 36 Eng. Rep. 779; *Sheppard v. Taylor*, 5 Pet. 675.)

In view of the relation of privity in which the defendants were placed, with McDonald and White, by force of the doctrine of *lis pendens* somewhat broadened by the fact of actual notice, on their part, of the situation, it became the duty of the defendants, when the decree was obtained against McDonald and White, to pay to plaintiffs, from the proceeds of the sale of the bonds, an amount sufficient to satisfy their lien upon them. If the defendants had then held the bonds, such decree may have been effectual to have reached them through the execution of the judgment.

The relation and situation of a purchaser *pendente lite*, is such that his protection against the result of the then pending action must be sought in it, and for that purpose he may step in and defend, or the plaintiff in it, to charge him *in personam*, may cause him to be brought in as a defendant. (*Harrington v. Slade*, 22 Barb. 161; *Ex Parte Railroad Co.*, 95 U. S. 221. And when the purchaser is so brought in and made a defendant, he will be treated as such party from the time of the commencement of the action, and consequently the statute of limitations will in such case be no more available to him than to the original defendants. And such would be the effect of the judgment as one *in rem*, although the purchaser

Opinion of the Court, per BRADLEY, J.

is not made a party to the action. (*Harrington v. Slade*, *supra*; *Walden v. Bodley*, 9 How. U. S. 34; *Fletcher v. Ferrel*, 9 Dana, 372; 35 Am. Dec. 143; *Talbott v. Bell*, 5 B. Monroe, 320; 43 Am. Dec. 126; *Jackson v. Losee*, 4 Sandf. Ch. 381.) This binding character and effect, are deemed essential to the proper administration of justice and to put an end to litigation. (*Bellamy v. Sabine* 1 DeGex. & J. 566, 578.) The defendants not having been made parties defendant in that suit, the decree as against them, could be treated only as a judgment *in rem*, and, as they had disposed of the bonds, it was ineffectual as such for the purpose of its execution. And it may be that their duty to pay to the plaintiffs the proceeds of the bonds, was but a liability enforceable by action to charge them *in personam*.

While an action in equity might be maintained to charge the defendants as trustees of the fund, and for an accounting as for the proceeds of the bonds, for the purpose of relief founded upon the lien, it is contended that the plaintiffs had ample remedy by action at law for destruction of their lien, or as for money had and received by the defendants to the plaintiffs' use. The question whether an action at law accrued to the plaintiffs against the defendants more than six years before this was commenced, is an important one in this case. For if that was the situation, although this action, as brought, was properly equitable in form, the statutory limitation of six years was applicable upon the well settled principle, that when there is a concurrent remedy at law and in equity, the limitation is the same in both forms of action, and the statutory bar of that at law controls. (*Borst v. Corey*, 15 N. Y. 505; *In re Neilley*, 95 N. Y. 383.) The plaintiffs may have maintained a suit in equity against the defendants, joining McDonald and White as co-defendants, for the purpose of perfecting their lien and to charge Riggs & Co. personally, after, as well as before, the sale by the latter of the bonds. But it is by no means clear that an action at law would have been maintainable by the plaintiffs against the defendants in this action, founded upon the lien to recover the amount of their claim

Opinion of the Court, per BRADLEY, J.

prior to the recovery of the decree against Mc Donald and White. The plaintiffs' right to a lien existed in contract, entered into before the award was made by the commission, by the terms of which, the payment of their claim for services was to be made a lien upon it. This was an equitable lien. It was neither *jus ad rem* nor *jus in rem*. It constituted no estate or property in the subject of it, nor any right which could be the basis of a possessory action. It was simply an encumbrance or charge upon it. The legal title remained in Mc Donald. (2 Story Eq. Juris. § 1215; 3 Pomeroy Eq. Jur. § 1233.) For the purposes of the lien, the proceeds of the sale took the place of the bonds, and the enforcement of it was exclusively within the province of a court of equity by suit, in which McDonald was a necessary party defendant until as against him the lien was perfected. And although the assignment must be deemed to have been taken by White, subject to all the equities against his assignor (*Bush v. Lathrop*, 22 N. Y. 535) it could not be assumed that he had no right to be heard. The contract upon which the plaintiffs relied for the lien, was executory, and the effectual perfection of it was dependent upon performance upon their part, of that required of the plaintiffs, to entitle them to payment. In equity it had effect as a lien, dependent on such performance, upon the principle that what is agreed and ought to be done is regarded as done. And if anything was requisite to accomplish it, the court could have directed specific performance of the contract. (Pomeroy Eq. Jur. § 1237; *In re Howe*, 1 Paige 125, 130; *Hale v. Omaha Nat. Bank*, 49 N. Y. 626; *McCaffrey v. Woodin*, 65 id. 459; *Payne v. Wilson*, 74 id. 348; *Seymour v. C. & N. F. R. R. Co.*, 25 Barb. 284; *Mitchell v. Winslow*, 2 Story, 630; *Metcalf v. Archbishop of York*, 1 Mylne & C. 547.) The only means for the enforcement of the lien was in equity. (*Pinch v. Anthony*, 8 Allen, 536, 539; *Milliman v. Neher*, 20 Barb. 37.) It would have been otherwise if the contract had contained an assignment of the claim of the plaintiffs. That might have furnished a right of action at law, if the claim may be said to have had a potential exist-

Opinion of the Court, per BRADLEY, J.

ence at the time it was made. (*Jones v. Mayor, etc.*, 90 N. Y. 387.) And as held in *McCaffrey v. Woodin* (*supra*), and *Gregory v. Morris* (96 U. S. 619), when with the equitable lien is given the right to take the property, the exercise of such right perfects the lien, and enables the party to assert it as a defense or in support of an action founded upon the right resulting from the execution of such power, and is supported by the lien. And in the like case of *Wisner v. Ocumpaugh* (71 N. Y. 113), the defendant was protected in the exercise of such right and the defense resting upon the lien, was deemed equitable. In *Hale v. Omaha Nat. Bank*, (*supra*) no right by the terms of the contract, for the lien, seems to have been given to take the property, and the possession, as there appeared, was taken by the defendant without any right. The question of parties was not raised in that case. Nor did the court hold that an action at law, could be maintained by the plaintiff, but it was held that the facts alleged were sufficient to support the action as equitable in character. And on the review of a subsequent trial of the same action (64 N. Y. 550) nothing to the contrary was held. In *Husted v. Ingraham*, (75 N. Y. 251) the plaintiffs had an equitable lien, and it was held, that the only relief to which the plaintiffs were entitled was equitable, and consequently they could not recover in the action for alleged conversion of the property, although it had been sold by the receiver of the parties, who had the title, but that the plaintiffs had a remedy in equity against the receiver founded upon the lien, to obtain the proceeds of the sale. The character of the equitable lien, resting in the contract between McDonald and the plaintiffs, was such that it gave the latter the right to follow the subject of it, and apply a remedy, which would have operated directly upon it, to realize the purpose of its creation. This was the purpose of the suit brought against McDonald and White. That suit was founded upon the contract, and its purpose was to perfect and execute the lien. This could be done in equity only. The existence of the lien and the right to enforce it were contested by McDonald. And treating, as we do, the defendants as pur-

Opinion of the Court, per BRADLEY, J.

chasers *pendente lite*, charged with notice of the action between the parties to the contract and its purposes, the rights of the parties to this action or to the subject in controversy, were dependent upon the result of that suit, and the final judgment there was conclusive upon them. It would, therefore, seem that during its pendency, the statute of limitations would not run in favor of such a purchaser as against the party who successfully establishes his right as against the *pendente lite* seller. Otherwise the doctrine of *lis pendens* might be defeated, and thus the result of a litigation rendered ineffectual. It would result in a multiplicity of suits for the protection of rights dependent upon the final determination of the litigation pending between the primary parties to the controversy. The theory of the doctrine of *lis pendens* is to preserve the situation, as it is when the original litigation is commenced, until its termination, that the successful party may then take the fruits of it without interruption from another, who may have, during its pendency, sought to obtain some right to the property in controversy. (*Tilton v. Cofield*, 93 U. S. 163; *Lamont v. Cheshire*, 65 N. Y. 36, and cases there cited.) Bennett, in his work on *Lis Pendens* (212), states the rule to be that in the ordinary case of a *pendente lite* purchaser of the subject of litigation, the statute of limitations cannot be invoked as against the successful litigant to avoid the results of the application of the rule of *lis pendens*. This is in harmony with the situation of privity existing between the litigating seller and the *pendente lite* purchaser, with the fact that the latter is bound by the determination of such pending action, and with the principle enunciated in *Harrington v. Slade* (22 Barb. 161); *Walden v. Bodley* (9 How. U. S. 34); *Tilton v. Cofield* (93 U. S. 163). Any action which the plaintiffs could maintain against the defendants, must be founded upon their equitable lien. And it would, therefore, seem that the situation of the defendants in their relation to the primary suit, was such that during its pendency the statute of limitations would not run in their favor to bar any form of action having for its object the satisfaction of the plaintiffs

Opinion of the Court, per BRADLEY, J.

claim, founded upon the security afforded by such lien. If that view is correct, it follows that no right of action at law either for the destruction of the lien or for money had and received, accrued to the plaintiffs against the defendants prior to the time of the recovery of the decree against McDonald and White. And assuming that there was a destruction of the lien produced either by the surrender of the old and taking the new issue of bonds or by the sale of the latter, it does not necessarily follow that an action at law would at any time lie against the defendants to recover damages for such destruction. It was not found that the defendants so surrendered the bonds or sold those reissued to them with the intent to defraud or injure the plaintiffs in their lien or with any purpose to defeat it. (*Yates v. Joyce*, 11 Johns. 136; *Lane v. Hitchcock*, 14 id. 213; *Gardner v. Heartt*, 3 Denio, 232.) The case last cited was an action by a mortgagee for an alleged negligent destruction of his lien, by doing injury to the mortgaged premises, which had that effect. The court held that fraudulent intent was essential to support the action, and that, as the lien of the mortgagee gave him no title to the land, the defendant was not liable to him for injury to it caused by his negligence, although it resulted in the destruction of his lien. That is within the principle of those earlier cases. They are all cited in *Van Pelt v. McGraw* (4 N. Y. 110), and their doctrine is there applied to afford a remedy. The facts found in the present action, as represented by the decision of the court, do not within that principle establish the existence, at any time, of such a cause of action against the defendants. The cause of action for the purpose of such a remedy is in tort. Its gravamen is a fraudulent intent or wrongful purpose to impair or destroy the lien, and to support such an action the facts must be such as to warrant the inference to that effect. No different doctrine was necessarily recognized in *Hale v. Omaha Nat. Bk.* (64 N. Y. 550), or in *Husted v. Ingraham* (75 N. Y. 251). The plaintiffs had no title to the bonds, and in the strictly legal sense of the term, their lien is said not to be property, although analagous to property. (3

Opinion of the Court, per BRADLEY, J.

Pomeroy Eq. Jur., § 1234.) And a lien is generally recognized at law to exist only when it is connected with the possession or the right to the possession of the subject of the lien. (2 Story Eq. Jur., § 1216.) The defendants had the legal title to the bonds transferred to them, also to those taken in their stead by the new issue made to them, and which they afterwards sold. It may be that they made such surrender, took the new bonds and sold the latter in good faith in fact, and without any intent to impair or defeat the plaintiff's lien. While the right of the plaintiff, as against the defendants, resulting from the final decree, was not affected by the decree and direction founded upon the sustaining of the demurrer, the fact of such decree dismissing the complaint first obtained in their suit with McDonald and White, was a circumstance bearing upon the good faith of the defendants by way of relief from the imputation of actual purpose to impair the plaintiff's lien by the disposition made of the bonds. In view of the doctrine before stated, and as declared in *Gardner v. Heartt*, the defendants may not be chargeable in an action as for impairment or destruction of the plaintiffs' lien. And, therefore, upon the facts found as represented by the decision of the trial court, the conclusion is not warranted that any right of action at any time arose as for the destruction of the lien. But on the contrary, the facts so found are consistent with good faith, in fact, on the part of the defendants, in purchasing the bonds and disposing of them. So far as the contention on the part of the defendants is dependent for its support upon their bad faith in the transaction, it is not sustained. And the assertion by a party of his wrongful act by way of protection against liability will not usually be taken for his advantage further than the facts fairly require. The plaintiffs do not assert the destruction of their lien. The question also arises, was the lien destroyed, in the sense sought to be applied, by the disposition made by the defendants of the bonds so as to enable them to assert the destruction of it by way of relief from liability? It is true that the opportunity to reach the bonds held by the receiver, is denied to the plaintiffs by the surrender

Opinion of the Court, per BRADLEY, J.

of them at the time the new ones were issued to the defendants. The latter bonds represented the former, and so did the proceeds of the sale in the currency received by the defendants. There is no propriety, either legal or moral, in the assertion of the defendants, for the purpose of putting themselves in the wrong, that those new bonds or the money derived from the sale, was not a substitute for those held by the receiver which they purchased. An equitable lien has the nature of or is analogous to a trust, and it is not for the party making the conversion into other securities to thus defeat the trust. He cannot derive any such advantage, but the substituted securities or proceeds in his hands are subject to it. And for the purpose of relief he is treated as having made the substitution for the benefit of the beneficiary if the latter elects to so treat it. This was the situation of the defendants in their relation to the plaintiffs, and that is the situation in which the plaintiffs seek to treat the defendants. The sale of securities held in trust or subject to an equitable lien, might be thought judicious by the holder under some circumstances. He might deem it so in case of a falling market or of an apprehended decline in value, or for the purpose of realizing a larger income from the fund represented by them. It would hardly be claimed that from a sale, in such case, a liability would arise as for a destruction of the lien, although he might be liable to account for the value of the securities if his action in making the sale was not justified or ratified. Nor would the party, in that relation, making such sale, or in case of conversion of the securities into others, be permitted to successfully assert that he had committed a wrongful act, which might have produced a remedy to the beneficiary of the lien or trust, so as to deny to the latter the right of affirmance of the act of conversion and substitution. The plaintiff's claim does not rest upon the assertion of any wrong on the part of the defendants in making the disposition they did make of the bonds. The action was brought to enforce their lien upon them and without knowledge of the sale, and afterwards having learned of the disposition of the bonds, the plaintiffs proceed in affirmance of

Opinion of the Court, per BRADLEY, J.

the sale, and seek through an accounting by the defendants for the proceeds of the sale, the relief to which the plaintiffs, by virtue of their lien, may be entitled by way of satisfaction of their claim of which such lien is the incident. When the plaintiffs obtained the decree against McDonald and White, it became the duty of the defendants to hand over to them such proceeds, and concurrently in time with the arising of such duty accrued to the plaintiffs the right to demand its performance.

The question relating to an action at law for destruction of the lien, seems to require here no further consideration. Some further attention may be given to the question, whether the plaintiffs had a right of action at law against the defendants as for money had and received by them to the use of the plaintiffs. And, if so, when the right to such action accrued to them. When one party receives or has money to which another is entitled, an action in that form, may be maintained, and the law will imply assumpsit for its support. And although the action rests upon a legal right, the nature of the remedy afforded by it, is such as to raise for determination the question as to which party in equity and good conscience is entitled to the money in controversy. Hence, it is called an equitable action. (*Buel v. Boughton*, 2 Denio 91; *Hathaway v. Cincinnatus*, 62 N. Y. 447.) The plaintiffs were equitably entitled to the proceeds of the sale of the bonds, to the extent of their claim, by reason of their lien upon them. The right of such action accrued when it became the duty of the defendants to pay the money over to them. That duty and liability of the defendants were dependent upon the effectual establishment of the lien against McDonald. A defeat of the plaintiffs, upon the merits, in the suit against McDonald and White, would have denied to the former the right to assert any lien as against the defendants. Such was the effect of the judgment on the demurrer dismissing the bill, so long as it remained unreversed. The liability of the defendants in such an action, was therefore dependent upon the result of that suit, and if they had paid the plaintiffs the amount claimed by them, and that suit had resulted in favor

Opinion of the Court, per BRADLEY, J.

of McDonald, it is not seen that the defendants would have had any remedy against their assignor, of the bonds, for reimbursement. It would have been treated as a payment without any duty or liability to make it. McDonald had the right to contest the plaintiffs' alleged claim of lien, and it was not in the power of the defendants to deny to him that right, or to render his successful denial of it ineffectual. This was the situation of the defendants in their relation to the other parties interested, until the final decree was obtained against McDonald and White, and until then the defendants could not assume that they were at liberty to pay anything to the plaintiffs from the proceeds of the sale of the bonds. When then did the right of action at law accrue to the plaintiffs against the defendants? As before suggested the lien upon which the plaintiffs relied existed in executory contract, and was cognizable in equity only, until it was perfected either by recognition or contract of McDonald, in terms making it so *in presenti* after performance by the plaintiff, or by decree to that effect. It being a lien in equity, and subject to equitable cognizance only, it furnished no support to an action at law for affirmative relief until it was in some manner perfected or established. (*Field v. Mayor, etc.*, 6 N. Y. 179, 187; *Chase v. Peck*, 21 N. Y. 581; *Payne v. Wilson*, 74 N. Y. 348; *Otis v. Sill*, 8 Barb. 102.) Reference is also made to the cases before cited. The contract in question may be treated as an agreement to give the plaintiffs a lien dependent upon the terms and condition of the contract, and while it attached as a lien in equity upon the award when made, it was not by force of the contract made a specific lien *in presenti* or recognizable at law until it was perfected by the decree. And even then no right of action at law upon the lien as such existed to obtain the possession of the property or its proceeds as that remedy is equitable only, but then, if at all, the right of action at law, founded upon the right to the fund supported by the lien, accrued to the plaintiffs to treat the proceeds as money had and received to their use by the defendants, and to demand its payment, because then, and not until then, it

Dissenting opinion, per HAIGHT, J.

became the duty of the defendants to recognize the right of the plaintiffs in that respect. Up to that time the lien was not only not recognized by McDonald, but was contested by him. And until then the plaintiffs' remedy must have been founded solely upon the alleged lien, and enforceable in equity only. The action would necessarily have been to charge the property or its proceeds with it, and for consequent relief. This is apparent for the reason, if no other, that the defendants were by their purchase *pendente lite* placed in privity with McDonald and bound by the result of the then pending suit; and their right and duty, as related to the plaintiffs, were involved in it, dependent upon its result and determined by it. It was not until then that the duty of the defendants arose to discharge the plaintiffs' lien, or that the latter could enforce the performance of that duty by an action as for money had and received to their use.

The case of *Pierson v. McCurdy* (33 Hun 521; affirmed 100 N. Y. 608), has not necessarily any essential application to the question here. There the fund in controversy belonging to the company represented by the plaintiff, had been wrongfully paid to and taken by the defendant. There was in that case the legal title to support an action for money had and received, and the right to maintain it arose when the money was thus unlawfully appropriated. Reference is also made to what has already been said on the subject of the right of action against the defendants as bearing upon the question lastly considered.

These views lead to a conclusion that the judgment should be reversed and a new trial granted, costs to abide the event.

HAIGHT, J. (dissenting) This action was brought to have the defendants declared to be the trustees of certain bonds of the District of Columbia, for the benefit of the plaintiffs, and that the plaintiffs have a lien upon and a right to such bonds, etc. This action was brought on the 16th day of April, 1884. The answer, among other things, alleges that the cause of action did not accrue within six years prior to the commence-

Dissenting opinion, per HAIGHT, J.

ment of this action. The trial court sustained this defense and dismissed the complaint.

This action was brought against the defendant's testator, John Elliott, who alone was served with process. The other defendants were the surviving partners of Riggs & Co. In the month of June, 1873, one Augustin R. McDonald entered into an agreement with the plaintiffs, by which they were to aid him in the prosecution of a claim which he then had pending before the mixed commission on British and American claims, under the treaty of May 8, 1871, for the value of a large quantity of cotton. Under the agreement the plaintiffs were to receive, as compensation, a sum equal to twenty-five per cent of any amount that was allowed on the claim, which was to be made a lien thereon, and upon any draft money or evidence of indebtedness which might be paid or issued thereon. In the month of September, 1873, an award was made upon the claim, for the sum of \$197,190 in gold, to be paid by the government of the United States. In October, 1874, the plaintiffs filed their bill in equity in the Supreme Court of the District of Columbia, against McDonald and one White, to whom McDonald had assigned the award, in which bill the plaintiffs asked to have their claim established at the sum of \$49,297.50 in gold, and that it be declared a lien upon the claim and upon the certificate of the amount allowed thereon, and upon all moneys which might become due in respect thereto. In February, 1875, an order was made, by consent of the parties, under which one-half of the award was paid over to White, under the assignment made to him by McDonald, and the other half of the award was paid over to George W. Riggs, as receiver, for him to hold subject to the claims, liens and rights of the plaintiffs and of one Phelps, as assignee, to be determined by the court. Riggs, as receiver, under an order of the court, invested the funds so received by him, in 3-65 bonds of the District of Columbia. The defendants in that action, having demurred to the bill of complaint, the Supreme Court of the District of Columbia, on the 24th day of June, 1875, made a decree, in and by which it was

Dissenting opinion, per HAIGHT, J.

ordered, adjudged and decreed that the demurrer be sustained, and that the bill be dismissed, with costs, and on the twenty-eighth day of June, thereafter, the same court made another decree, in which the receiver was directed to pay the funds belonging to the case, in his hands, to the defendants, McDonald and White, and that thereupon the receiver should be discharged. McDonald thereupon applied to Riggs, the receiver, for a surrender and delivery to him of the bonds held by Riggs, as receiver, and thereupon Riggs, the receiver, made personal application to the judge holding the court at which the decree was made, for instructions as to the delivery of the bonds to McDonald, and was informed by the judge that the delivery should be made. Thereupon Riggs, the receiver, did deliver the bonds to McDonald. Upon the same day McDonald sold the bonds to the firm of Riggs & Co., of Washington, of which firm George W. Riggs, the receiver, and John Elliott, the defendant in this action, were members. The firm of Riggs & Co. paid full market value for the bonds, and thereafter took them to the treasury of the United States and surrendered them to the treasury department, and, subsequently, other and new bonds were issued in their place, to the firm of Riggs & Co., and thereafter and in the month of December, 1875, the firm of Riggs & Co. sold the re-issued bonds in the market, and the same parted from out of their possession and were dispersed among the purchasers thereof. Appeals having been taken from the decrees sustaining the demurrer and directing the receiver to deliver the funds over to the defendants, the General Term of the Supreme Court of the District of Columbia, on the 4th day of March, 1876, made a degree reversing the judgments or decrees of the 24th day of June, 1875, and of the 28th day of June, 1875, and ordered that the cause be remanded to the Special Term, with leave to the defendants to answer the complainant's bill. The defendants in that action having answered, the court, on the 5th day of May, 1876, made a further order requiring the defendants in that action to pay into court the sum of \$49,297.50 in gold, and, subsequently the defendants in that action were adjudged

Dissenting opinion, per HAIGHT, J.

guilty of a contempt in having failed to obey such order, and, as punishment therefore, their answer was stricken out and removed from the files of the court; thereafter, and on the 12th day of February, 1878, the court made an order that the bill of complaint of the plaintiffs in that action be taken *pro confesso* against the defendants, and on the seventeenth day of April thereafter, a decree absolute was made, in which it was adjudged and decreed that the defendants, McDonald and White, pay to the complainants the sum of \$49,297.50 in gold, and that the complainants have a lien upon the claim of Augustin R. McDonald against the United States, as awarded by the mixed commission on British and American claims, and upon any draft, money, evidence of debt or the proceeds thereof, with legal interest from that day.

The first question which it becomes necessary for us to determine is as to the nature of the remedy or the kinds of relief that the plaintiffs have against the defendants. In considering this question, we shall assume that the lien of the plaintiffs extended to the bonds in the hands of Riggs & Co., that the firm having purchased them *pendente lite*, with knowledge of the fact that they were the subject of the litigation. We shall assume further that the original bonds having been surrendered to the Treasury Department and new ones issued in the place thereof, that the lien of the plaintiffs extended to such re-issued bonds. The referee has found as a fact that they were non-negotiable. It is, therefore, possible that the plaintiffs could follow the bonds into the hands of purchasers in good faith without notice of the lien and still maintain their lien. But the plaintiffs, having sold them in open market, to strangers, it would doubtless, be difficult, if not impossible, to trace them, and the lien must, therefore, be deemed as practically terminated or destroyed. The firm of Riggs & Co. sold the bonds in market, for full value, and received the money therefor. That firm was the owner of the bonds, but held them subject to the lien of the plaintiffs, and having practically destroyed the lien by making it difficult or impossible for the plaintiffs to pursue the bonds farther, must be held liable to the plaintiffs, in some form.

Dissenting opinion, per HAIGHT, J.

In this action the plaintiffs seek relief in equity. In their complaint they allege that they had no knowledge of the purchase of the bonds by Riggs & Co. until the 17th day of June, 1878. Aside from the statute of limitations, we shall not question the right of the plaintiffs to maintain this action although it is now apparent that no equitable relief can be granted; for the rule doubtless is, that where a party, in good faith, without knowledge of the happening of the event which renders equitable relief no longer possible, brings his action for such relief, equity will retain jurisdiction and award him the damages he may be entitled to. But if he brings an action for equitable relief with knowledge of the facts that such relief is no longer possible, the complaint will ordinarily be dismissed and he will be remitted to his remedy at law. (*Hatch v. Cobb*, 4 John. Ch. 559; *Kempshall v. Stone*, 5 id. 193; *Morse v. El mendorf*, 11 Paige, 287.)

If, therefore, the plaintiffs brought the action in good faith, believing that the bonds were in the possession of Riggs & Co., without knowledge of the fact that they had been sold and disposed of, a court of equity may properly retain jurisdiction of their action to award them such relief as they are entitled to. But what relief can they have? The bonds are gone and can be no longer reached. Prior to the sale of the bonds, Riggs & Co. were under no obligation to the plaintiffs and no judgment *in personam* could be recovered against them. They held the bonds subject to the lien. But after the sale the relations of the parties was changed. The bonds were converted into money and Riggs & Co. held the money, in the place of the bonds, and, having the money, must account to the plaintiffs for the value of their lien. But the lien covered only a portion of the bonds. It did not cover their entire value, and, consequently, only a portion of the money received upon the sale could be claimed by the plaintiffs. But this portion cannot be separated or identified from the rest of the money, so that we cannot determine that the lien attached to any particular part or portion of the money received; and it does not appear that it has ever been kept separate and distinct

Dissenting opinion, per HAIGHT, J.

from other moneys, so that any particular fund or money can be proceeded against *in rem*. We must, therefore, treat it as money had and received, for which Riggs & Co. are liable to account to the plaintiffs for the value of their lien. It consequently appears to us that the only relief that could be given would be a money judgment for the amount of the lien. Might not this relief have been obtained by an action at law? The defendants had an interest in the bonds as owners. The plaintiffs had an interest in them as lienors. Both parties were interested. They were not tenants in common or joint owners and yet their relations after the sale were in some respects similar to a case where one joint owner had disposed of the entire property and had received the proceeds thereof. It may have been disposed of under circumstances which would constitute a conversion, or it may have been disposed of under circumstances in which the seller recognized the joint ownership, and received the proceeds as the agent or trustee of such joint owner. In either case, the joint owner had the right to treat the sale as made for his benefit and on his account and recover in an action of assumpsit the amount of his interest. Riggs & Co. sold the bonds in the open market to strangers, for full value, under circumstances making it difficult, if not impossible, to further trace them. The plaintiffs' lien was thereby made unavailable and was in effect destroyed. Riggs & Co., having received the full value, must be deemed to have received the plaintiffs' interest and to hold it for and on their account. It might be called a constructive trust or perhaps it would be more accurately described as analogous to a trust in which the law implied a promise to pay, and an action in assumpsit would lie therefor as for money had and received. (*Pierson v. McCurdy*, 33 Hun, 520; affirmed, 100 N. Y. 608; 3 Pomeroy Eq. Jurs., § 1234.)

It is also contended that the transfer of the bonds destroyed the plaintiffs' lien, and that an action on the case for such destruction could be maintained. (*Yates v. Joyce*, 11 Johns. 136; *Lane v. Hitchcock*, 14 id. 213; *Van Pelt v. McGraw*, 4 N. Y. 110; *Manning v. Monaghan*, 23 id. 539; *Hale*

Dissenting opinion, per HAIGHT, J.

v. *Omaha Nat. Bank*, 49 id. 626; 64 id. 555; *Husted v. Ingraham*, 75 id. 259.)

But we do not care to consider this question, for, under our views of the case, it becomes unimportant. Our conclusions are that, if an action in equity can be maintained at all, it can be only for a money judgment to the amount of the plaintiffs' claim, and that an action at law may be maintained for the same relief, and that the remedies are concurrent.

Prior to the adoption of the Code of Procedure it was provided by the Revised Statutes that "whenever there is a concurrent jurisdiction in courts of common law and in courts of equity, of any cause of action, the provisions of this title limiting a time for the commencement of a suit for such cause of action in a court of common law shall apply to all suits hereafter to be brought for the same cause in the court of chancery." (2 R. S., 301.)

The adoption of the Code did away with this provision of the statute, but it was not intended to change the law in this respect. The court of chancery has been abolished, and it was not necessary to continue this section in the Code, for the provisions of the Code were so framed as to include all actions not excepted, and prescribed uniform rules declaratory of the time within which they might be brought. And the limitations of actions in equity follow that prescribed in actions at law of concurrent jurisdiction where the remedy at law is complete and effectual. (*Pierson v. McCurdy, supra*; *Butler v. Johnson*, 111 N. Y. 204.)

The trial court and the General Term appear to have reached the conclusion that the plaintiffs' lien was property and that the sale of the bonds in the market was a destruction of the plaintiffs' lien, and that it constituted an injury to property within the meaning of subdivision 3 of section 382 of the Code. We do not consider or question these conclusions, for if we are right in the view which we have taken, that there was an implied promise to pay, and that an action in assumpsit would lie thereon, the case would be controlled by subdivision 1 of section 382, which prescribes a limitation of six years in

Dissenting opinion, per HAIGHT, J.

an action upon a contract, obligation or liability, expressed or implied, except a judgment or sealed instrument. There is no pretence that this case is brought within the exceptions mentioned. It consequently remains to be determined as to when the statute commenced to run. Ordinarily an action for money had and received, accrues as soon as the defendant has received the money. It is contended, however, that in this case no cause of action accrued to the plaintiffs until they obtained their decree in their action against McDonald and White in the Supreme Court of the District of Columbia, which was on the 17th day of April, 1878; but we do not understand that the plaintiffs' lien was created by the decree in that action. It was created by the contract which the plaintiffs made with McDonald to prosecute his claim before the commission, and has existed ever since by virtue of that contract. When the money was paid over to the receiver, to be invested in bonds, the lien was, by the contract and agreement of the parties, transferred to such bonds. The decree of the court adjudged and determined that there was such a contract and lien existing. It was not necessary for the plaintiffs to delay the bringing of this action until that action was determined. They were at liberty to prosecute the defendants immediately upon their disposing of the bonds. All the facts in reference to the making of the contract, the obtaining of the award, the existence of the lien, could have been shown in this action as well as in that. It is possible that the plaintiffs would have been prejudiced by the decrees entered upon the sustaining of the demurrer during the time that those decrees were in force, unreversed. But those decrees were reversed on the 4th day of March, 1876, more than eight years before the commencement of this action. The plaintiffs claim that they did not know of the sale; but ignorance of the fact that they had a cause of action against the defendants does not prevent the running of the statute in cases of this character. The provisions of subdivision 5 of the section of the Code under consideration, have no application to actions brought upon implied contracts to pay.

Statement of case.

We are, consequently, of the opinion that the statute of limitations had run at the time this action was brought, and that the judgment should be affirmed, with costs.

All concur with BRADLEY, J., except FOLLETT, Ch. J., HAIGHT and BROWN, JJ., dissenting.

Judgment reversed.

118	152
127	140

MARY A. GORDON, Respondent, v. HERMAN H. NIEMANN et al., Appellant.

The parties entered into a contract in writing, by the terms of which, defendants sold to plaintiff a stock of patterns for \$500 and agreed to sell her such patterns as she should order during the ensuing year at prices specified; she agreeing to keep on hand a full assortment of all patterns made by defendants. Defendant also agreed that during the continuance of the contract they would take back old and undesirable patterns and give others in exchange. The contract by its terms was to continue for the term of one year from date, "or longer, with the right of transfer, if mutually agreeable." After the expiration of the year plaintiff desiring to discontinue the business, asked defendant to take back all unsold patterns and refund the price she had paid, about \$488, and on defendants' refusal brought this action to recover the same, alleging that contemporaneously with said contract, an oral agreement was made to the effect that if at the end of the year, or at any other time, plaintiff should be dissatisfied and wish to discontinue the business, defendants would, upon notice, relieve her of the agency by taking back the patterns remaining in her hands and refunding the money paid. On the trial plaintiff was permitted to prove the oral agreement. *Held*, error; as such agreement was in conflict with the terms of the written contract, and nullified its provisions.

Also, *held*, that the oral agreement was void under the statute of frauds, as by its terms it was not to be performed within a year.

(Submitted October 14, 1889; decided January 14, 1890.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made December 16, 1886, which affirmed a judgment in favor of plaintiff entered upon a verdict.

The nature of the action and the facts are sufficiently stated in the opinion:

Opinion of the Court, per FOLLETT, Ch. J.

Raphael J. Moses for appellant. When a memorandum is made and it is capable of a clear and intelligible exposition * * parol evidence is incompetent to contradict or vary its terms. (*Long v. M. I. Co.*, 1 N. Y. S. R. 38; *Reed* on Stat. of Frauds, §§ 25, 324; *Williams v. Robinson*, 73 Me. 195; *Hubbard v. Marshall*, 50 Wis. 327; *Tait v. Allen*, 18 Kan. 545; *Selp v. King*, 28 Tex. 552; 2 *Reed* on Stat. of Frauds, § 445; *Hunt v. Adams*, 7 Mass. 518; *Mosely v. Hanford*, 10 Barn. & Cross. 729; *Bookstaver v. Jayne*, 60 N. Y. 146; *Benton v. Martin*, 57 id. 570; *Somerby v. Harden*, 1 Johns. Ch. 253; *Johnson v. McIntosh*, 31 Barb. 267; *Burbank v. Beech*, 15 id. 332; *Frost v. Everett*, 5 Cow. 497; *Martin v. Rapellie*, 3 Edw. 229; *Hunt v. Blumer*, 5 Duer, 202; *F. & M. Bk. v. Winfield*, 24 Wend. 419; *Van Allen v. Allen*, 1 Hilt. 524; *Irwin v. Sanders*, 1 Cow. 249; *Ridley v. Dale*, 4 N. Y. 486; *Lewis v. Jones*, 7 Bosw. 356; *Brown v. Crawford*, 5 Otto, 481.) The contract alleged to be established by Williams, and Nieman's conversation was in violation of the Statute of Frauds. (2 *Parsons* on Contract, 45; *Bracegirdle v. Heald*, 1 B. & Ald. 722; *Roberts v. Rockbottom Co.*, 7 Metc. 47; *Broadwell v. Getman*, 2 Denio, 87; *Boydell v. Drummond*, 11 East. 142; *Herring v. Butters*, 20 Me. 119; *Peters v. Westborough*, 19 Pick. 364; 1 *Reed* on Stat. of Frauds, §§ 188, 195; *Gault v. Brown*, 48 N. H. 185; *Miles v. Bough*, L. R., [3 Q. B.] 845; *Walker v. Johnson*, 96 U. S. 437; *McPherson v. Cox*, Id. 401; *Childs v. W. C. Co.*, 13 Wkly. Dig. 59.)

S. W. Valentine for respondent.

FOLLETT, Ch. J.. In 1881 and 1882 the defendants were partners under the name of the Universal Fashion Company, and engaged in manufacturing and selling paper patterns. June 21, 1881, the parties to this action entered into a written contract by which the defendants sold to the plaintiff a stock of patterns for \$500, three-fifths of which were then delivered and the remainder were to be delivered in time for the fall

Opinion of the Court, per FOLLETT, Ch. J.

trade of that year. The plaintiff paid seventy-five dollars down and agreed to pay the remainder of the price at certain specified dates within the ensuing year. By the contract the defendants were bound to sell during the ensuing year to the plaintiff such patterns as she should order for one-half of the retail price, and she was bound to keep on hand a full assortment of all patterns made by the defendants. It was provided by the contract that during its continuance the defendants should take back from the plaintiff the old and undesirable patterns left out of their catalogues for the succeeding seasons, and give in exchange such other patterns as were ordered when the old ones were returned. The written contract provided that it was to continue "for the term of one year from the date hereof, or longer, with the right of transfer, if mutually agreeable."

It is agreed that for one year each party fully performed this contract. At the end of the year the plaintiff desired to discontinue the business and asked the defendants to take back all unsold patterns and refund the price which she had paid, which they refused to do. In April, 1885, she brought this action, alleging that she had purchased patterns for which she had paid \$504.50, and that she had on hand patterns unsold for which she had paid \$488.75, which sum, with interest from the dates of payment, she sought to recover. As a ground for this action, she alleged that contemporaneously with the written agreement, an oral agreement was made by which it was "agreed that if at the end of one year, or at any other time, plaintiff should be dissatisfied with said fashion or pattern business, and should wish to discontinue the said agency, that they, said defendants, would, upon such notice from said plaintiff, relieve said plaintiff of said agency by taking from her all patterns of the said Universal Fashion Company remaining in her hands and refunding to her all moneys paid by her for the same."

On the trial the plaintiff testified: "Mr. Williams, at the time this written agreement was made, said that I should have the agency for one year, or longer if I preferred, and that at the time that I wished to end this agency that they would

Opinion of the Court, per FOLLETT, Ch. J.

transfer the agency, take back the stock on hand and refund the money I had paid for it. I continued the agency for a year. After a year had expired, I had a conversation as to the transferring it with Mr. Nieman, at his office, Fourteenth street, New York city." * * * "It was understood that I was to keep it for one year; for one year, or longer if I preferred, without making the transfer."

Lizzie Burkett, one of the plaintiff's employes, testified that she was present when the written contract was made, and that "Mr. Williams told Miss Gordon that she was to take the agency for one year or longer, and at the end of that time, if she did not wish to keep it, to get it transferred, the stock taken, and the money refunded." Annie F. Nolan, another of plaintiff's employes, testified that she was present when the written contract was made, and that "Mr. Williams told Miss Gordon, at the end of the year, that if she wished to discontinue the agency that they would transfer the agency, take up the stock and refund the money that she had paid for it." This testimony was objected to on the ground that it tended to contradict the written contract, and at the end of the plaintiff's case, the defendants moved that the complaint be dismissed, on the ground that the oral agreement testified to was, by its terms, not to be performed in one year from the making thereof, and also that it was for the sale of goods for the price of fifty dollars, or more, and was void by the statute of frauds. The motion was denied. The defendants and their witnesses denied the making of the oral contract. The court instructed the jury that there were two issues for them to pass upon: (1) Was the oral agreement made as the plaintiff testified? (2) Did Mr. Neimann agree that he would transfer the agency, take back the stock and refund the money? The jury was further instructed that if they found both issues in favor of the plaintiff, she was entitled to a verdict of \$484, with interest for two years, but if they found either issue in favor of the defendants, they were entitled to a verdict. The jury rendered a verdict for \$542, on which a judgment was entered, which was affirmed at General Term.

Statement of case.

The court erred in permitting the plaintiff to establish a contemporaneous oral contract which nullified the provision of the written contract that the patterns were sold, and only unsalable ones were to be returned. This evidence was not admissible upon the theory that it was explanatory of the expression, "with the right of transfer if mutually agreeable." The right of transfer evidently means that the plaintiff might transfer to some other person her rights under the contract, if that person was satisfactory to the defendants. Again, the oral contract testified to, was, by its terms, not to be performed within one year from the making thereof, and for that reason it was void by the statute of frauds.

The judgment should be reversed, and a new trial granted, with costs to abide the event.

All concur, except BRADLEY and HAIGHT, JJ., not voting; BROWN, J., not sitting.

Judgment reversed.

ELLEN O'DONNELL, Respondent, v. ROBERT MCINTYRE,
Appellant.

One who acquires title to real estate pursuant to a tax sale is not in privity with the former owner, and an attornment by a tenant to such a purchaser is an attornment to a stranger and is, as against the former owner, void. (1 R. S. 744, § 3.) (FOLLETT, Ch. J., dissenting.)

Hubbell v. Wildon (H. & D. Sup. 139), distinguished.

One B. entered into possession of certain premises as plaintiff's tenant.

Defendant who claimed title under a tax sale, presented his deed and demanded possession of B. The latter surrendered the house keys and agreed thereafter to continue in possession as defendant's tenant. Plaintiff went to the house with a carpenter to put on new locks, and while so engaged defendant entered and ordered her to leave and on her refusal attempted to eject her. In an action for assault and battery, the court charged that plaintiff was at the time in possession and had the right to use reasonable force to retain possession; and that defendant had no right to use force to acquire possession. *Held* (FOLLETT, Ch. J. dissenting), no error.

Reported below, (37 Hun, 623).

(Argued October 17, 1889; decided January 14, 1890.)

Statement of case.

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made October 26, 1885, which affirmed a judgment in favor of plaintiff, entered upon a verdict.

This action was brought to recover damages for an assault and battery which the plaintiff alleged the defendant committed on her April 5, 1883, at a dwelling-house known as No. 39 Orange street in the city of Rochester, which dwelling each party claimed to be the owner and in possession of. The battery was committed while each was using more or less force against the other in defending the possession claimed.

It was assumed on the trial that the plaintiff had been the owner of the premises from prior to April 1, 1881, to March 1, 1883, and in possession through her tenant from the first date to April 2, 1883. In 1879 the premises were assessed for taxes to Mary Harrigan, but whether as owner or occupant the case does not show. On the third Tuesday of August, 1880, the premises were sold for the non-payment of taxes for 1879, and August 29, 1882, the defendant received a deed which in terms conveyed the fee. On the first day of March, 1883, the time allowed for redemption had run, and assuming the validity of the tax proceedings, which were not questioned on the trial, the defendant then became the owner in fee simple. The record does not show when, from whom or how the plaintiff acquired her title or possession, but it does appear and was not disputed on the trial that about April 1, 1881, one Joseph N. Bates entered into possession of the premises as plaintiff's tenant, and occupied them under the plaintiff until April 2, 1883, when the defendant presented his tax deed and demanded possession of Bates, who then surrendered the house keys to the defendant, and agreed to thereafter continue in possession as his tenant and pay the subsequently accruing rent to him. The plaintiff heard that the defendant had taken the house keys, and in the afternoon of April 5, 1883, she went to the house with a carpenter to put on new locks and fit new keys to the locks from which the keys had been taken, and while engaged in this work the defendant entered the house and

Statement of case.

ordered the plaintiff to leave, but she refused, and thereupon he attempted to eject her by force, which attempt was successfully resisted.

J. A. Stull for appellant.

Fanning and Williams for respondents. The evidence and the findings of the referee established that there was a cloud upon the plaintiff's title which should be removed. (Laws of 1877, chap. 104, §§ 11, 12; *Stewart v. Chrysler*, 100 N. Y. 378; *Rumsey v. City of Buffalo*, 97 id. 114; *Crook v. Andrews*, 40 id. 547; *Lattin v. McCarty*, 41 id. 107-110; *R. P. Co. v. O'Dougherty*, 81 id. 474; *Strassburgh v. Mayor, etc.*, 87 id. 452; *Townshend v. Williams*, 19 Wkly. Dig., 502; *Schoener v. Lissauer*, 107 N. Y. 116-117; *Miner v. Beekman*, 50 id. 343; *Bruecher v. Village of Portchester*, 31 Hun, 556; *Pier v. Fon du Lac*, 38 Wis. 471-479; *Alimony v. Hicks*, 40 Tenn. 38-41; *Cooley on Taxation* [2d ed.] 779-780; 2 Story's Eq. Juris., § 700.) The statute and all the proceedings upon which the tax deeds in question were issued, being in derogation of common law rights, should be strictly construed. (*Whitney v. Thomas*, 23 N. Y. 281-286; *Thompson v. Burhans*, 61 id. 65; *Hilton v. Bender*, 69 id. 81; *Newell v. Wheeler*, 48 id. 486-490-492; *Simonton v. Hays*, 32 Hun, 286; *Cooley on Tax.*, 334.) The tax deed in question is void, as there is no certificate to the assessment-roll as provided by statute. (Laws of 1861, chap. 143, §§ 87, 133; Laws of 1869, chap. 267, § 5; 1 R. S. [6th ed], 937, §§ 19, 20; Laws of 1880, chap. 14, § 122; Laws of 1851, chap. 170, 334, § 8; *Paris v. Golden*, 35 N. Y. 467; *Westfall v. Preston*, 49 id. 353; *Van Rensselaer v. Whitbeck*, 7 id. 521; Laws of 1861, chap. 143, § 127; *Bellinger v. Gray*, 51 N. Y. 620; *Murphy v. Mayor, etc.*, 22 Alb. L. J. 387; *People ex rel v. Forrest*, 96 N. Y. 544; *Beach v. Hays*, 58 How. Pr. 17; *Adriance v. McCafferty*, 2 Rob. 153-5; *In re A. R. R. Co.*, 8 N. Y. S. R. 486; *Bradley v. Ward*, 58 N. Y. 406-7; *Brown on Assessments*, 469; *Burroughs on Taxation*, 233; *Cooley on Taxation* [2d ed.], 413; *Merritt v. Portchester*, 71 N. Y. 309;

Statement of case.

Brevoort v. City of Brooklyn, 89 id. 128; *Hinckley v. Cooper*, 22 Hun, 253, 257; *Johnson v. Elwood*, 53 N. Y. 432-438; *Shattuck v. Bascom*, 105 id. 40-45; *People ex rel v. Suffern*, 68 N. Y. 321-326; *Westfall v. Preston*, 49 id. 349; *Inman v. Coleman*, 37 Hun, 170; *Lockwood v. Gelert*, 24 N. Y. S. R. 246; *Clark v. Norton*, 49 N. Y. 246, 248; *Remsen v. Wheeler*, 105 id. 573.) The assessment was also void because the roll was not properly verified or timely delivered. (1 R. S. [6th ed.] 928, § 25; 2 R. S. [7th ed.] 989, 994, § 8; Laws of 1876, chap. 196, §§ 12, 16; *Nat. Bank v. City of Elmira*, 53 N. Y. 49-59; *Craft v. Merrill*, 14 id. 456; *Van Rensselaer v. Whitbeck*, 7 id. 517; *Coleman v. Shattuck*, 62 id. 361; *Westfall v. Preston*, 49 id. 349; *Thompson v. Burhans*, 61 id. 63; *Bradley v. Ward et al*, 56 id. 406-7; *Brevort v. Brooklyn*, 89 id. 132; *Martin v. Barbour*, 34 Fed. Rep. 701; Brown on Assessments, 471-472; *People ex rel v. Wemple*, 115 N. Y. 302; Blackwell on Tax Titles, 131; *Tilden v. Duden*, 15 N. Y. S. R., 80; *T. Mfg. Co., v Lathrop*, 7 Conn. 550; *People ex rel v. Haupt*, 104 N. Y. 377. The assessment was void, because it was made to neither owner nor occupant. (1 R. S. [6th ed.] 934, §§ 1, 2, 3; 2 R. S. [7th ed.] 989; *Chapman v. City of Brooklyn*, 40 N. Y. 372; *Whitney v. Thomas*, 23 N. Y. 281; *Ritter v. Worth*, 58 id. 627; *Newell v. Wheeler*, 48 id. 499; *Dubois v. Webster*, 7 Hun, 371-3; *Pink v. Barberi*, 17 N. Y. Wkly. Dig. 521; 30 Hun, 487; *National Bank v. City of Elmira*, 53 N. Y. 53; *People v. Cassity*, 46 id. 54-5; *Calkins v. Chamberlin*, 15 N. Y. State Rep. 576; *Woolsey v. Long Island city*, 13 N. Y. Wkly. Dig. 182 25 Hun, 230; *Troubridge v. Horan*, 18 N. Y. 439; *N. Y. C. & H. R. R. Co. v. Lyon*, 16 Barb. 651; *Brown v. Goodwin*, 75 N. Y. 409; *Marsh v. City of Brooklyn*, 59 N. Y. 280, 287; *Whitney v. Thomas*, 23 id. 281, 286; Laws of 1861, chap. 143, § 127.) The tax deed is void also, as no notice to redeem has been served as provided by sections 15, 16 and 19 of chapter 104 of the Laws of 1877, as amended by chapter 127, Laws 1880. (*Simonton v. Hays*, 19 Wkly. Dig. 58; 32 Hun, 286; *Donahue v. O'Connor*, 12 J. and S.

Statement of case.

300; *Willis v. Gilbert*, 34 Hun, 568; Laws of 1880, chap. 127, § 15.) The defense of non-joinder of parties is not well taken. (Code Civ. Proc. §§ 1500, 1638; *McCrea v. N. Y. E. R. R. Co.*, 23; N. Y. Wkly. Dig. 344; 13 Daly 302; *Todd v. Lunt*, 19 N. E. R. 522; *Hasbrouck v. Bowen* 62 N. Y. 475, 479; *Hogg v. Shank*, 23 N. Y. S. R. 312; Code Civ. Proc. § 2657; Redf. on Surrogates, [2d ed.] 52; *Wetmore v. Parker*, 52 N. Y. 450, 456; *Rodengas v. E. R. S. Inst.*, 63 id. 460-468, 474; *Richardson v. West*, 10 N. Y. Wkly. Dig. 66; Code Civ. Proc. §§ 2658, 2659; *Ferguson v. Crawford*, 86 N. Y. 610.) Although the plaintiff, at the commencement of this action was not in actual possession of the premises in question, yet that is no ground for a reversal of the judgment. (*Lattin v. McCarty*, 41 N. Y. 107; *R. P. Co. v. O'Dougherty*, 81 id. 474; *Pirly v. Rockwell*, 1 Sheld. 268; *Alimony v. Hicks*, 40 Tenn. 38, 41; *Bausman v. Kelly*, 36 N. W. Rep. 334, 337; Code Civ. Pro. § 373; *Whiting v. Edmunds*, 94 N. Y. 314; *O'Donnell v. McIntyre*, 41 Hun, 100, 102; *O'Donnell v. McIntyre*, 37 id. 623, 627; *Rogers v. Boynton*, 57 Ala. 501; *Turnley v. Hanna*, 67 id. 101; *Bell v. Spotts*, 8 J. & S. 552; *Ludlow v. Simonds*, 2 Caines 56; *Hawley v. Cramer*, 4 Cow. 727; *Grandin v. Leroy*, 2 Paige, 509; *Rees v. Smith*, 1 Ohio, 509; *Gregory v. L. C. Bank*, 20 N. W. Rep. 286; *Snowden v. Tyler*, 31 id. 661; *Underhill v. Van Cortland*, 2 John. Ch. 339, 369; Code Civ. Proc. § 1638; *Armitage v. Pulver*, 37 N. Y. 494.) The appellant stands in no position for equitable consideration. (*Jewett v. Lampier*, 20 Wkly. Dig. 222; 34 Hun, 623; *Martin v. Barbour*, 34 Fed. Rep. 701; *Newell v. Wheeler*, 48 N. Y. 486-492.) Defendant's course was to test his tax-title by ejectment and not by procuring a fraudulent attornment of plaintiff's tenant. (*Sperling v. Isaacs*, 22 N. Y. Wkly. Dig. 174; Blackwell on Tax Title, 492; Code Civ. Pro. § 2233; *Bliss v. Johnson*, 73 N. Y. 533; *McMillan v. Cronn*, 75 id. 474; *Pollen v. Brewer*, 7 C. B. [N. S.] 371; *Parsons v. Brown*, 15 Barb. 590; *Sampson v. Henry*, 11 Pick. 387; *Stewart v. Roderick*, 4 Watts & Serg. 188; *Smith*

Opinion of the Court, per PARKER, J

v. *Cooper*, 16 Pac. Rep. 958, 960; 39 Am. Dec. 71; *Jackson v. Harper*, 5 Wend. 246; *Towne v. Butterfield*, 97 Mass. 105; *Miller v. Lang*, 99 id. 13; *Bailey v. Moore*, 21 Ill. 165; *Laurence v. Brown*, 5 N. Y. 395-405; *Kenada v. Gardner*, 3 Barb. 589; *Sperling v. Isaacs*, 22 N. Y. Wkly Dig. 174; *Newman v. Marshall*, 22 id. 211; 32 Ill. 65; *Mohan v. Butler*, 3 Cent. Rep. 407; *O'Donnell v. McIntyre*, 41 Hun, 100; *Jackson v. Rowland*, 6 Wend. 666-670; *Jackson v. Davis*, 5 Cow 124-132; *Niles v. Ransford*, 1 Mich. 338; *Hoag v. Hoag*, 35 N. Y. 471; 51 Am. Dec. 95.) Section 373 of the Code of Civil Procedure bars the defendant from claiming any right to possession which he can claim through a tenant which would be adverse to the landlord. (*Whitting v. Edmunds*, 94 N. Y. 309.) In so far as the question of fact is concerned, the judgment will not be disturbed, as the printed case on this appeal does not show, and there is no certificate, that it contains all the evidence. (20 N. Y. S. R. 689; 39 Hun, 193; 36 id. 160; 35 id. 118; 34 id. 178-180.)

PARKER, J. The question requiring consideration is presented by an exception taken to the charge of the learned trial justice. He instructed the jury that the plaintiff was at the time of the quarrel in possession of the premises and had the right to use reasonable force to retain her possession and to eject the defendant; that he had no right to exercise force to acquire possession or to remain in the house after having been notified by the plaintiff to leave. It is insisted by the appellant that the attornment of Bates to the defendant was valid and that thereafter he was the owner and in possession of the premises. The statute provides: "Sec. 3. The attornment of a tenant to a stranger shall be absolutely void and shall not in any way affect the possession of his landlord unless it be made (1) with the consent of the landlord; or, (2) pursuant to, or in consequence of a judgment at law or the order or decree of a court of equity; or, (3) to the mortgagee after the mortgage has become forfeited." (1 R. S., 744).

All attainments by lessees were not abolished by the Revised Statutes. (*Austin v. Ahearne*, 61 N. Y. 6.)

If then, the defendant, after obtaining tax title to these premises was a stranger to the plaintiff in respect thereto the attainment was void, otherwise it was valid. In its general legal signification, stranger is opposed to the word privy. By privy is meant the mutual or successive relationship to the same rights of property, and privies are classified according to the manner of relationships. There are privies in estate, as donor and donee, lessor and lessee, and joint tenants; privies in blood, as heir and ancestor; privies in representation, as testator, executor and administrator; privies in law, as where the law without privy of blood or estate casts land upon another as by escheat. (1st Greenleaf, § 189; Bouvier's Institutes.)

We are of the opinion that one who acquires real estate pursuant to a tax sale is not in privy with the former owner. No contractual relation exists between them. The owner does not grant his title. Such a purchaser is a grantee of the state. (*Becker v. Howard*, 66 N. Y. 5.)

The land is assessed irrespective of any special interests, the taxation of all particular estates or rights being merged in the burden put upon it. If the tax be not paid, then the state, by virtue of its taxing power, and through the medium provided by statute, either acquires the land or grants it to a citizen. The purchaser is not subjected to any of the inconveniences of the old title, nor can he take any advantage from it. Covenants running with the land do not bind him, nor do him any good. (Blackwell on Tax Titles, § 965.)

He not only obtains his title from a source, other than the former owner, but the estate acquired is not of necessity the same. The owner of the old title may have granted rights of way and other easements which a purchaser from him would be estopped from denying. He may have encumbered the lands by mortgage, in which event the estate acquired by his grantee would likewise be burdened with it. But, as we have seen, the owner of the tax title obtains the land free from encumbrances of every character, not excepting the mortgage lien after

Dissenting opinion, per FOLLETT, Ch. J.

the mortgagee's time for redemption has expired. (*Becker v. Howard, supra.*)

It seems to be apparent therefore that the plaintiff and defendant were not privies, but strangers. It follows that the attempted attornment by the tenant to this defendant was void, and that the trial court rightly instructed the jury.

We do not regard *Hubbell v. Weldon*, (Hill & Denio's Supplement, 139) as an authority upon the question here decided. Neither the right of a tenant to attorn, the statute in relation thereto, nor the question of privity were before the court for consideration. The action was ejectment brought by the grantee, of one who had acquired title pursuant to a tax sale, against a tenant who had entered into possession of the premises under a lease from the former owner. Objection was made that the lot was held adversely at the time of the conveyance from the purchaser at the tax sale to the plaintiff, and that for that reason the deed was void. And it was with reference to that question solely that the observations were made which are urged in support of appellant's contention.

The other exceptions do not require consideration.

The judgment should be affirmed.

FOLLETT, Ch. J. (dissenting). The witnesses sworn in behalf of the defendant, as well as those sworn in behalf of the plaintiff, testified that the defendant attempted to eject the plaintiff from the house by force and that she successfully resisted, but there is much dispute between them as to the amount of force exercised by each. The learned trial justice instructed the jury that the plaintiff was, at the time of the quarrel, in possession of the premises and had the right to use reasonable force to retain her possession and to eject the defendant, but he had no right to exercise force to acquire possession or to remain in the house after having been notified by the plaintiff to leave. The exception to this instruction, which was repeated in various forms, presents the only question argued on this appeal.

The learned trial justice held, and in this he was sustained

Dissenting opinion, per FOLLETT, Ch. J.

at General Term, that the attornment of Bates to defendant was void under the Revised Statute, which provides:

"Sec. 3. The attornment of a tenant to a stranger shall be absolutely void, and shall not in any way affect the possession of his landlord unless it be made,

"1. With the consent of the landlord; or

"2. Pursuant to or in consequence of a judgment at law, or the order or decree of a court of equity; or

"2. To a mortgagee after the mortgage has become forfeited." (1 R. S. 744.)

The tax sale was had and the deed given under chapter 104 of the Laws of 1877, the twentieth section of which provides that six months after a certain notice has been served and a certificate given, "the conveyance before made shall thereupon become absolute, and the occupant and all others interested in said lands shall be forever barred of all rights and title thereto." This certificate was issued March 1, 1883.

All attornments by lessees were not abolished by the Revised Statutes. (*Austin v. Ahearne*, 61 N. Y. 6.)

It was held below that the defendant was a stranger to the plaintiff's title and that the attornment, not falling within any of the three exceptions, was void. The word *stranger* as used in the section quoted, is a person between whom and the landlord there is no privity and whose title or right of possession is not derived from the landlord, but is hostile to his title. (Wood's Inst. 245; Toml. Law Dic. and Abb. Law Dic., title Stranger.)

Under chapter 104 of the Laws of 1877, the defendant acquired by virtue of his purchase in August, 1880, only a lien on the premises, which continued until August 29, 1882, the date of his deed, by which he acquired a conditional title, which became absolute March 1, 1883, the date of the certificate issued by the county treasurer. (Black. Tax Titles, §§ 955, 965.) While the proceedings out of which the deed arose related to the time when the tax was assessed against Mary Harrigan, the defendant's title was derived directly from the plaintiff through the taxing power of the state, and

Statement of case.

she and the defendant were not strangers, but privies. (*Hubbell v. Welton*, Hill & Denio Supl. 139; Black. Tax Titles, §§ 954-988; Wood's Inst. 245; Toml. Law Dic.; Abb. Law Dic., title Stranger.) In the case cited, Chief Justice NELSON, speaking for a unanimous court, said: "Assuming the tax sale valid, the owners or occupants are to be regarded after that as holding in subordination to the title of the purchaser, as *quasi* tenant to him, like a defendant in possession after sale of his real estate on judgment and execution."

Assuming, as it was at the Circuit and at the General Term (and there is no evidence in the record which tends to contradict the assumption), that the defendant acquired a legal title in fee March 1, 1883, the symbolic delivery of the possession of the premises by Bates to defendant and their agreement that thereafter Bates should be the tenant of the defendant and pay the subsequently accruing rent to him, divested the possession of the plaintiff and vested the defendant with the possession of the premises.

These views lead to a reversal of the judgment and a new trial, with costs to abide the event.

All concur with PARKER, J., except FOLLETT, Ch. J., dissenting, VANN, J., not voting, and BRADLEY, J., not sitting. Judgment affirmed.

THOMAS HALPIN, Respondent v. THE PHENIX INSURANCE COMPANY, Appellant.

Where a finding of fact by a court or referee is without evidence to support it, it is a ruling upon a question of law (Code Civ. Pro. § 993) and if excepted to, presents a legal question reviewable here.

It is not necessary for the purposes of such review, that the case should show that it contains all the evidence; the exception appearing in the proposed case serves as a notice to the respondent of an intention to raise the question of legal error, and puts on him the responsibility of adding, by amendment, any omitted evidence on the question.

Porter v. Smith (107 N. Y. 531), distinguished; *Cox v. James* (45 N. Y. 557), so far as this question is concerned, stated to have been overruled.

118	165
118	547

118	165
120	72
120	78
120	616

118	165
122	117
122	453
122	582

118	165
127	223

118	165
130	143
130	697

118	165
134	30
134	407

118	165
150	860

118	165
158	638

Statement of case.

Defendant issued a policy of fire insurance upon a building described therein as "occupied as a morocco factory;" the policy contained a provision making it void in case the building became vacant or unoccupied, without the consent of the company. The building was used for a manufacturing business until about six months before the fire; after that no business was carried on in it. All the machinery remained on the property, but the building was closed and locked and in the hands of an agent for rent. The agent had the key and made frequent visits to the property to show it to persons who came to hire it, and a watchman lived next door; but when or how often he visited the property did not appear, plaintiff had not visited it within a month before the fire. *Held*, that the building was, at the time of the fire, unoccupied within the terms of the policy, and that, therefore, it was void.

Johnson v. N. Y. B. F. Ins. Co. (89 Hun, 410); *Paine v. A. Ins. Co.* (5 T. & C. 619); *Whitney v. B. R. Ins. Co.* (72 N. Y. 117); *A. L. Works v. W. C. F. Ins. Co.* (2 Fed. Rep. 488); *Keith v. Q. F. M. Ins. Co.* (10 Allen, 228); *Ashmeith v. Ins. Co.* (112 Mass. 422), distinguished.

To constitute occupancy of a building used for manufacturing purposes there must be some practical use or employment of the property. Its use as a place of storage merely is not sufficient.

A condition against non-occupancy must be construed and applied in reference to the subject-matter of the contract and the ordinary incidents attending the use of the insured property.

An insurer has, where the policy contains such a condition, a right by the terms of his policy to the care and supervision which is involved in the use of the property contemplated by the parties at the time of entering into the contract.

Where there is no dispute as to the amount of a debt, a tender may always be restricted by such conditions as by the terms of the contract the debtor on payment has a right to insist upon, and to which the creditor has no right to object.

A mortgagor, therefore, has a right to attach as a condition of payment of the debt secured, that the owner execute a satisfaction of the mortgage.

A tender, to be effectual for the purpose of stopping interest and prevent costs, must be kept good by the debtor, and whenever he seeks to make it the basis of affirmative relief it must be paid into court, so that the creditor may get the money, and that fact must be alleged in the pleading.

Where, however, no objection is taken by the pleadings on the other side to a failure to allege payment into court, the act may be performed on trial, and, in the absence of any objection then taken, the presumption on appeal is that it was performed.

(Argued October 17, 1889; decided January 14, 1890.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order

Statement of case.

made December 14, 1886, which affirmed a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

This action was brought to compel the defendant to execute and deliver to the plaintiff a satisfaction of a mortgage executed by the plaintiff and his wife to the East Brooklyn Savings Bank, and subsequently assigned to defendant, and to deliver up the bond secured by said mortgage.

The defendant had issued a policy of insurance for \$2,500 to the plaintiff upon the building on the mortgaged premises which contained a condition making it void in case said building became vacant or unoccupied without the consent of the company, which policy was assigned to the mortgagee. The mortgagee also held a policy for a like amount in the Williamsburgh City Fire Insurance Company. The buildings were destroyed by fire on January 4, 1884, and soon thereafter the Williamsburgh company paid the amount of its policy to the mortgagee and such amount was indorsed upon the mortgage. The defendant refused to pay its policy on the ground that at the time of the fire, the buildings were unoccupied, and on or about April 17, 1884, took from the mortgagee an assignment of the bond and mortgage held by it, paying therefor the sum of \$2,585.63. On December 31, 1884, the plaintiff, claiming that he was entitled to have credited on the bond and mortgage the amount of the policy issued by defendant, tendered to it the sum of \$100 for interest and expenses incurred in and about the assignment and demanded that defendant deliver to him the bond and mortgage and execute and deliver to him a satisfaction of the mortgage, which defendant refused to do.

The trial court found as a fact "that at the time of the fire the insured premises were in charge of and in the occupancy of the plaintiff" and gave judgment for the plaintiff. To said finding defendant excepted.

H. C. M. Ingraham for appellant. The tender made by plaintiff did not extinguish the mortgage debt. (*Noyes v. Wyckoff*, 114 N. Y. 204; *Kortright v. Cady*, 21 id. 343;

Statement of case.

Tuthill v. Morris, 81 id. 94; *Brooklyn Bank v. DeGrauw*, 23 Wend. 341; *Woods v. Hitchcock*, 20 id. 47; *Story v. Krewson*, 55 Ind. 397; *Clark v. Mayor, etc.*, 1 Keyes, 9; *Beckner v. Boon*, 61 N. Y. 317.) The language of this policy is "vacant or unoccupied," and it is established that where those two words are connected by "or," if the premises are unoccupied, though they are not *vacant*, the policy is made void. (*Barry v. P. Ins. Co.*, 35 Hun, 601; *Herrman v. A. F. Ins. Co.*, 85 N. Y. 162; *Herrman v. M. Ins. Co.*, 81 id. 184.) The premises were unoccupied within the meaning of the policy. (*Herrman v. A. F. Ins. Co.*, 85 N. Y. 162; *Paine v. A. Ins. Co.*, 5 T. & C., 609; *Keith v. L. M. F. Ins. Co.*, 10 Allen, 228.)

Nathaniel C. Moak, for respondent. If the facts found by the trial court were sustained by any evidence authorizing their finding they cannot be reviewed in this court but are here conclusive between the parties. (Code, § 1337; *Quincy v. White*, 63 N. Y. 375; *Reynolds v. Robinson*, 82 id. 106; *People ex rel v. French*, 92 id. 306, 310; *Derham v. Lee*, 87 id. 604-5; *Matter of Ross*, 87 id. 514, 517-8; *Hynes v. McDermott*, 91 id. 451, 464.) The case does not show that it contains all the evidence, or all the evidence bearing upon the question of occupancy of the insured premises, and hence the finding of the court that the premises insured were not "vacant or unoccupied" is not open to review here. (*Porter v. Smith*, 107 N. Y. 531; *Genet v. Brooklyn*, 21 N. E. Rep. 106; *Wait v. As. Co.*, 13 Hun, 371; *Woodruff v. I. F. Ins. Co.*, 83 N. Y. 133; *In re Ward*, 52 id. 397.) This is the defendant's policy, the conditions are its own, and must be construed most favorable to the insured, and the defendant is responsible for any uncertainty, or anything that is doubtful in this condition. (*Baley v. H. Ins. Co.*, 80 N. Y. 23; *Herrman v. M. Ins. Co.*, 81 N. Y. 184; *Hoffman v. A. Ins. Co.*, 82 id. 405; *Griffey v. N. Y. Ins. Co.*, 100 id. 417; *Reynold v. C. Ins. Co.*, 47 id. 597; *Rosenwald v. Phoenix Ins. Co.*, 50 Hun, 174-5; *Rann v. H. Ins. Co.*, 59 N. Y. 387.) The words "vacant" or "unoccupied" must be construed with reference to

Statement of case.

the kind of structure or building insured and the purposes for which used. (*Whitney v. B. R. Ins. Co.*, 9 Hun, 37; 72 N. Y. 118; *Herrman v. M. Ins. Co.*, 81 N. Y. 184; 12 J. & S. 444-452, 453; *Herrman v. A. Ins. Co.*, 85 N. Y. 162; *Barry v. P. Ins. Co.*, 35 Hun, 604; *W. A. Co. v. Mason*, 5 Bradw. 141; *Woodruff v. Ins. Co.*, 83 N. Y. 133, 141-4; *Cummins v. A. Ins. Co.*, 67 id. 260; *Franklin v. Kepler*, 95 Penn. St. 492; *P. Ins. Co. v. Tucker*, 92 Ill. 70-4; *Shackelton v. F. Ins. Co.*, 55 Mich. 288, 291; *Lasalle v. Ins. Co.*, 43 N. J. Law, 468; *Gibbs v. C. Ins. Co.*, 13 Hun, 612, 620; *Garnswell v. M. Ins. Co.*, 12 Cush. 167; *O'Brien v. C. Ins. Co.*, 6 J. & S. 517; *Stupetski v. T. F. Ins. Co.*, 43 Mich. 373; *Eddy v. H. Ins. Co.*, 70 Ia. 472; *Kimball v. M. Ins. Co.*, 70 id. 511; *Morehouse v. Agricultural Ins. Co.*, 11 N. Y. Wkly. Dig. 228; 23 Hun, 294; *Whitney v. B. R. Ins. Co.*, 72 N. Y. 117; *Miller v. Oswego*, 18 Hun, 526; *In re Imperial Ins. Co.*, 83 Ky. 468; *Stensgaard v. N. F. Ins. Co.*, 36 Minn. 181; *Miaghan v. H. Ins. Co.*, 24 Hun, 58; *A. F. Ins. Co. v. C. B. Mfg. Co.*, 17 N. E. Rep. 771; *L. M. Ins. Co. v. Leathers*, 6 Cent. Rep. 901; *Poss v. Ins. Co.*, Ica. 704; *A. L. Works v. W. C. F. Ins. Co.* 2 Fed. Rep. 488; *Harrington v. Ins. Co.*, 124 Mass. 126; *Cummins v. A. Ins. Co.*, 67 N. Y. 260; *Woodruff v. Imperial*, 83 id. 133, 144; *Stupetski v. T. F. Ins. Co.*, 43 Mich. 375; *Kimball v. M. Ins. Co.*, 70 Ia., 513, 516; *Williams v. N. G. Ins. Co.*, 24 Fed. Rep. 625, 628; *Bennett v. A. Ins. Co.*, 106 N. Y. 243; *Herrman v. M. Ins. Co.*, 81 id. 184; *Miaghan v. H. F. Ins. Co.*, 24 Hun. 58.) No tender was necessary in this case to perfect plaintiffs' right of action. (*Richardson v. Jackson*, 8 M. & W. 298; *Coit v. Houston*, 3 Johns. Cas. 250; *Cole v. Blake*, Peake, 179; *Bull v. Parker*, 2 Dowl. (N. S.) 345; *Olean v. Traut*, 50 N. Y. 474; *Wilder v. Seelye*, 8 Barb. 408; *Smith v. Rockwell*, 2 Hill, 482; *Cutler v. Gould*, 43 Hun, 518; *Hausard v. Robinson*, 7 B. & Cress. 90; *Wheelock v. Tanner*, 39 N. Y. 481-486; *Cass v. Higgenbotam*, 100 id. 248; *Kortright v. Cady*, 21 id. 343; *Hartley v. Tatham*, 1 Keyes, 222; *Stoddard v. Hart*, 23 N. Y. 560.)

Opinion of the Court, per BROWN, J.

BROWN, J. The appellant excepted to the finding that "the insured property, at the time of the fire, was in the occupation of the plaintiff," and asks this court to review that finding on the ground that it is without evidence tending to sustain it.

It is claimed by the respondent that that question is not reviewable here, for the reason that the case contains no statement that all the evidence given on the trial is contained within it and cites *Porter v. Smith* (107 N. Y. 531), in support of his contention.

In the case cited it was sought to have the General Term review a finding of fact made upon conflicting testimony, and this the General Term refused to do, in the absence of a statement in the case, that it contained all the evidence given on the trial and this court sustained that ruling.

The case has no application to the question now presented, as a finding without evidence to sustain it, is a ruling upon a question of law (Code, § 993), while a finding upon conflicting testimony, is a ruling upon a question of fact. (§ 992.)

This court reviews rulings upon questions of fact on appeals from judgments entered upon reports of referees or on decision of a court without a jury, in the single instance of a reversal of the judgment by the General Term upon the facts. But a finding of fact without evidence to support it has always been regarded as a ruling upon a question of law, and if excepted to presented a legal question reviewable in this court. (*Mason v. Lord*, 40 N. Y. 477; *Cox v. James*, 45 id. 557; *Perkins v. Hill*, 56 id. 87; *Pollock v. Pollock*, 71 id. 137; *Sickles v. Flanagan*, 79 id. 224.)

Under the old Code exceptions to findings of fact were essential to their review upon appeal, whether they presented rulings upon questions of fact or rulings upon questions of law, and it was not necessary to their proper presentation to the General Term that the case on appeal should show affirmatively that it contained all the evidence given upon the trial. (*Perkins v. Hill*, 56 N. Y. 87.)

In the case cited it was held that when exceptions were taken to findings of fact and a case made for the purpose of

Opinion of the Court, per BROWN, J.

reviewing them, that it would be assumed that all the evidence in support of the findings excepted to was inserted in the case. That if any evidence was omitted by the party making up the case, it was the duty of the respondent to cause to be inserted by amendment all evidence which he deemed material to sustain the findings excepted to.

The new Code made no change in the mode of reviewing rulings upon questions of law. Exceptions must now be taken or the appellate court will not review such ruling. (§ 992 to 997.)

But as to rulings on questions of fact exceptions are not under the present Code permitted, and hence there is nothing to notify or warn the successful party of his oponent's intention to ask the appellate court to review such finding, unless there is a statement in the case on appeal that it contains all the evidence; and hence it was decided in *Porter v. Smith* (*supra*), that in the absence of such a statement the respondent might rely on the assumption that there was no intention to ask a review of rulings on questions of fact. But as to rulings on questions of law, there is no need to depart from the practice sanctioned in *Perkins v. Hill*. An exception appearing in the proposed case serves as a notice to the respondent of an intention to raise the question of error in the ruling excepted to, and puts on him the responsibility of adding by amendment any needed proof, upon the particular question, just as a certificate that the case contains all the evidence, notifies him of an intention to review the question of error in findings of fact based on the allegation of insufficient proof.

I have been unable to find any authority to the effect that this court would not review a finding of fact excepted to on the ground that there was no evidence to support it, unless the case affirmatively showed that it contained all the evidence, except the dictum to that effect in *Cox v. James* (45 N. Y. 557), and this ruling must be deemed to be overruled in *Perkins v. Hill*.

The learned judge who wrote the opinion in *Cox v. James* concurred in the decision in the case last cited.

Opinion of the Court, per BROWN, J.

In the recent case of *Beddow v. N. Y. Floating Dry Dock Co.* (112 N. Y. 369), the chief judge says, "exceptions to alleged findings of fact when they are unsupported by evidence * * * * * present questions of law reviewable in this court.

In that case there was no certificate or statement to the effect that the case contained all the evidence.

These views lead to the conclusion that a statement that all the evidence given on the trial is contained in the case, is not essential to present for review in this court a finding alleged to be without evidence to sustain it.

The appellant is, therefore, correct in his claim that the finding excepted to is properly before the court for review, and we must assume that all the evidence introduced on the trial bearing upon the fact of occupancy has been inserted in the case.

We think the evidence does not justify the conclusion that the premises at the time of the fire were occupied within the meaning and contemplation of the parties to the contract.

The property is described in the policy as "occupied as a morocco factory." Manufacturing business was carried on there until July previous to the fire. The plaintiff lived in Newark, New Jersey, and he testified that he received rent up to July and after that no business was carried on there.

All the machinery remained on the property but the building was closed and locked and was in the hands of Edward Falkner, as agent for the plaintiff, for rent. Falkner had a key and made frequent visits to the property, sometimes to show it to applicants who came to rent it. John Halpin lived next door and was watchman there, but at what time or how often he visited the property does not appear. The plaintiff had not visited the building within a month preceding the fire which occurred on January 4, 1884.

It has been decided that a dwelling-house to be in a state of occupation must be the customary abode of human beings; not absolutely and uninterruptedly continuous, but the house must be the place of usual return and habitual stoppage.

Opinion of the Court, per BROWN, J.

(*Herrman v. Adriatic F. Ins. Co.*, 85 N. Y. 162; *Cummins v. Agricultural Ins. Co.*, 67 N. Y. 260.)

It was not in the contemplation of the parties to the contract under consideration that the building insured should be the home or the place of abode of any person and the decisions relating to similar provisions in policies upon dwellings are not material except to show that while a dwelling-house will not be regarded as occupied unless it is the home or dwelling place of some person, yet temporary absence, leaving the property for a short period unoccupied will not be regarded as a breach of the condition, while absence for a fixed definite period, even with the intention to return and occupy the property will violate the condition and render the policy void.

Thus in *Johnson v. N. Y. B. F. Ins. Co.* (39 Hun, 410), a temporary absence of eight or ten days before the fire was held not to violate a condition similar to the one we are considering and in *Paine v. Agricultural Ins. Co.* (5 T. & C. 619) it was said: "It is not necessary that some person should live in it every moment during the life of the policy, but there must not be a cessation of occupancy for any considerable portion of time."

In *Herrman v. Adriatic F. Ins. Co.*, (*supra*) it was held that a dwelling-house which was the summer residence of the plaintiff was not occupied within the meaning of the parties during the winter months although a farmer living on the plaintiff's farm or some member of his family visited the house regularly once a week, and the plaintiff and his wife made fortnightly visits but did not remain over night.

Whitney v. B. R. Ins. Co., (72 N. Y. 118) was a case of insurance upon a saw-mill operated by water power where the policy was to be void if the premises became "vacant or unoccupied." No sawing had been done for sixteen or eighteen days before the fire, but there were logs at the mill which the plaintiff intended to saw; lumber was piled in the yard and a small quantity was in the mill from which up to the time of the fire sales were made. The suspension of work was temporary and the condition was held not to have been violated, the court saying "delays and interruptions inci-

Opinion of the Court, per BROWN, J.

dent to the business of conducting a saw-mill although involving a temporary discontinuance of the active use of the mill for sawing purposes would not, we think, make the mill vacant and unoccupied within the meaning of the policy. The evidence would not have justified the finding that the plaintiff had abandoned or intended to abandon the use of the mill."

In *Albion Lead Works v. Williamsburgh City Fire Ins. Co.*, (2 Fed. Rep. 488,) the works had been stopped for five days before the fire but were still used for storage and delivery of goods, requiring daily visits of one or more persons. It was said by the court that the condition avoiding the policy if the premises "became unoccupied" without the consent of the company must refer to something more than a mere temporary suspension of work at the mill." *Keith v. Q. M F. Ins. Co.*, (10 Allen, 228) was a case of insurance on a trip-hammer shop, the policy containing a condition making it void in case the building remained unoccupied for thirty days without notice and it was held that "it was not sufficient to constitute occupancy that the tools remained in the shop and that the plaintiff's son went through the shop almost every day to see if things were right, but some practical use must have been made of the building." This case was followed in *Ashworth v. B. M. F. Ins. Co.*, (112 Mass. 422), a case of insurance upon a house and barn, the court saying that "occupancy, as applied to such buildings, implies an actual use of the house as a dwelling place and such use of the barn as is ordinary incident to a barn belonging to an occupied house or at least something more than a use of it for mere storage."

This citation of authorities is sufficient to show that to constitute occupancy of a building used for manufacturing purposes there must be some practical use or employment of the property. Its use as a place of storage merely is not sufficient.

The condition against non-occupancy must be construed and applied in reference to the subject-matter of the contract and of the ordinary incidents attending the use of the insured property. The insurer has a right by the terms of the policy to the care and supervision which is involved in the use of the

Opinion of the Court, per BROWN, J.

property contemplated by the parties at the time of entering into the contract.

Thus, as has been said, a policy on a church would not be deemed violated from non-occupation, because it was only used Sundays nor would a school-house be deemed unoccupied during vacation time. Nor a manufactory during suspension of business at night or on Sundays or holidays, or from breakage of machinery or from any other temporary cause, because these periods of non-occupation are incident to the uses of the property and in contemplation of the parties to the contract. But in this case there was a total and absolute suspension of business. The tenants who had used the property had moved away and the property was placed in the hands of an agent for rent. The owner was seeking for it new uses and new occupants.

There is nothing in the evidence to indicate that the business of manufacturing leather would necessarily be resumed by any one, but even if it was intended to rent it for such purpose only, it was, at the time of the fire, abandoned as a place of business and without practical use or employment and the insurer was therefore deprived of the care which would have been exercised over the property had it been so employed.

Under such circumstances we think it was unoccupied within the meaning of the policy. That this interpretation was the one understood by the parties finds strong corroboration in the fact that Falkner, the agent, was notified by the Williamsburgh company that the property was unoccupied and under a similar condition in the policy issued by that company obtained its consent that the "buildings remain unoccupied, commencing from November 1, 1883," and paid an additional premium for such consent.

These views must lead to a reversal of the judgment but in as much as upon another trial other evidence may be produced it is deemed proper to refer briefly to the other points raised by the appellant.

It is claimed that the tender was not effectual to entitle plaintiff to the judgment for the reason that it was conditioned on the execution by defendant of a satisfaction of the mortgage.

Opinion of the Court, per BROWN, J.

The cases cited by the learned counsel for the appellant do not sustain this claim. The distinction must be observed between cases in which terms are added not embraced in the contract or which the acceptance of the tender would cause the creditor to admit, and those in which the conditions are such as the debtor, on payment of the debt, has a right to insist upon and to which the creditor has no right to object.

In the first class are all cases in which the tender is made on condition that it pay or extinguish the debt. The acceptance of such tender binds the creditor and compels him to admit that the sum tendered is the whole amount due and estops him from asserting the contrary.

This distinction is tersely stated by Lord Denman in *Bowen v. Owen* (11 Q. B. 130), as follows: "All persons who make a tender in form do so for the purpose of extinguishing debts. If they merely propose that the creditor shall take the sum offered and leave it open to him to prosecute his claim for more, such a tender is free from objection, but if a party says: 'I will not pay this money unless you give a receipt for it as the whole amount due' that is no legal tender."

Of this class of cases are *Noyes v. Wyckoff* (114 N. Y. 204); *Brooklyn Bk. v. De Grauw*, (23 Wend. 342); *Wood v. Hitchcock* (20 id. 47), and the English cases cited in the opinion.

But where there is no dispute as to the amount of the debt, a tender may always be restricted by such conditions as by the terms of the contract are conditions precedent or simultaneous to the payment of the debt or proper to be performed by the party to whom the tender is made. (*Wheelock v. Tanner*, 39 N. Y. 481; *Cass v. Higenbotam*, 100 N. Y. 253; *Saunders v. Frost*, 5 Pick. 259; *Ocean Nat. Bank v. Fant*, 50 N. Y. 474; *Cutler v. Gould*, 43 Hun 516; *Bailey v. County of Buchanan*, 115 N. Y. 297; *Smith v. Rockwell*, 2 Hill 482.)

In the case first cited the condition was that a mortgage should be discharged. In *Cass v. Higenbotam* the condition was that certain diamonds deposited as collateral to the debt

Opinion of the Court, per BROWN, J.

should be returned. In *Saunders v. Frost* a release was demanded. In *Ocean Nat. Bank v. Fant* it was held that a demand of payment of a promissory note without an offer to return collateral securities was insufficient to charge an indorser. In *Smith v. Rockwell*, it was held that a maker or indorser is not bound to pay a negotiable promissory note without receiving it as their voucher.

In *Cutler v. Goold*, it was held that the plaintiff was justified in requiring that certain negotiable notes given to defendant, and not due, should be delivered up to him as a condition of parting with the money tendered. And in *Bailey v. County of Buchanan*, it was recently held by this court that the obligee of a bond having the option to redeem has a right to demand as a condition of payment the surrender of the bond and all the coupons in the holders possession.

In all these cases the party making the tender had a legal right to insist as a condition of payment that the party to whom the tender was made do the things demanded, and for that reason coupling such condition to the acceptance of the tender did not destroy its effect.

A debtor who has transferred securities as collateral to the debt, has a legal right upon payment of the debt, to have such collaterals reassigned to him, and a tender of the debt is not destroyed by making a condition of its acceptance that the creditor transfer the collaterals to him, because that condition is one the debtor has a right to insist upon and the creditor no right to refuse; so a mortgagor who pays a bond and mortgage, has a legal right to have the mortgage satisfied on the record. In no way, except by a certificate of the holder of the mortgage, can that result be accomplished. It is within the terms of the contract between the parties, and is a thing which, on payment of the debt, the mortgagee is under an obligation to do and one which a court of equity would compel him to do. It is a condition, therefore, which the mortgagor has a right to attach to the tender of the debt, and does not destroy its effect. The tender found by the trial court was, therefore, sufficient.

Statement of case.

It was incumbent upon the plaintiff to keep his tender good and upon the commencement of the action to have deposited the money in court. The effect of the tender is to stop interest and prevent costs, and to be effectual for such purpose must be kept good by the debtor, and whenever he seeks to make it the basis of affirmative relief, it must be paid into court, where the creditor can get it, and that fact alleged in the pleadings. It then becomes the creditor's money, and the debtor cannot dispute his right to it. (*Becker v. Boon*, 61 N. Y. 322; *Tuthill v. Morris*, 81 id. 100; *Sheriden v. Smith*, 2 Hill, 538; *Storer v. McGaw*, 11 Allen, 527.)

No objection was taken in the answer to the failure to allege a payment into court, and we think that act could, in the absence of any objections in the pleadings, have been performed on the trial. And as no objection was taken at the trial, the assumption must now be that it was performed.

Opportunity was there given for objections, and when none are made and the party whose duty it is to object remains silent, all reasonable intendments will be made by the appellate court to uphold the judgment. (*Jencks v. Smith*, 1 N. Y. 90; *Ford v. Monroe*, 20 Wend. 210; *Carman v. Pultz*, 21 N. Y. 547.) We cannot, therefore, assume that an act so essential to the relief sought by the plaintiff was not performed.

The judgment should be reversed and a new trial granted, with costs to abide the event.

BRADLEY, HAIGHT, PARKER and POTTER, JJ., concur; POTTER, J., in result.

FOLLETT, Ch. J. and VANN, J., dissent.

Judgment reversed.

WILLIAM J. CRUIKSHANK, Respondent, v. WILLIAM GORDON, Appellant.

Statements made in respect to a practicing physician, imputing to him general ignorance of medical science, incompetency to treat diseases, and a general want of professional skill, are slanderous, and actionable without proof of special damages.

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Statement of case.

Defendant, in his answer in such an action, alleged, in mitigation, that plaintiff was "not sufficiently, ordinarily skillful nor competent as a physician, and had no reputation as a competent physician, and never had." Defendant offered no evidence in support of this allegation. The court read it to the jury and instructed them that if it was unproved and they believed it was inserted maliciously and without out probable cause, they might consider the imputation in aggravation of damages. *Held*, no error.

Klinck v. Colby, (46 N. Y. 427)); *Doe v. Roe*, (32 Hun, 628); distinguished. The authorization by the Code of Civil Procedure, (§ 535) of pleas in mitigation, in actions of slander, is not a license for their interposition in bad faith, and when they are so interposed, that fact may be considered by the jury.

Two physicians were permitted to testify that plaintiff was reputed to be a competent and skillful physician. This was objected to by the defendant generally and objection overruled. *Held*, that as no ground for the objection was stated, an exception to the ruling was not available.

Plaintiff was allowed to prove that, between the date when the cause of action arose, and the date when the action was begun, defendant repeated the slanders on occasions other than those set forth in the complaint. *Held*, no error.

Plaintiff was also allowed to show that defendant had attempted to hire one of plaintiff's witnesses to leave the country. *Held*, no error.

Reported below (48 Hun, 808).

(Submitted, November 28, 1889, decided January 14, 1890.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made May 23, 1888, which affirmed a judgment in favor of plaintiff entered upon a verdict.

This was an action for slander.

The following facts appear: Since 1880, the plaintiff has been a practicing physician, and in November, 1883, he treated a servant employed in the family of the defendant, and afterwards treated his wife and children. On November 19, 1884, he was called to attend defendant's child, but his treatment being unsatisfactory, he was, at defendant's instance, superseded by Dr. John Griffin. The defendant paid the plaintiff for his services. In August, 1886, this action was brought to recover damages for words alleged to have been spoken by the defendant on six different occasions in

Statement of case.

respect to the plaintiff's competency to practice as a physician. No special damages were alleged in the complaint or proved on the trial.

A witness testified that defendant said: "That Dr. Cruikshank had treated his child for malaria when she hadn't the malaria at all; that he never should pay him a cent; and wound up by saying if he hadn't employed another doctor, Dr. Cruikshank would have killed his daughter." These words are alleged as the first cause of action.

Another witness who had a sick child then being treated, by the plaintiff, testified that defendant said to him: "I had no right to take Dr. Cruikshank, he would not under any consideration take Dr. Cruikshank for a case; that he was no good, he was only a butcher; so I asked him why; he said his child was sick and he almost killed her, if he didn't call another doctor in; and he told me if I didn't get another doctor right away he would kill my child, that I would be the murderer of my child; he asked me 'What sickness is it?' I told him he had diphtheria; he said, 'Oh, that is nothing at all; he would just as well take a case of diphtheria as he would drive nails in wood;" that he was no good; that wherever he went he would tell that he was no good; he asked me if I syringed the child's throat; I said no; he said every doctor gives a prescription and if the child has diphtheria he gives a syringe; that Dr. Cruikshank was only practicing on my child; that he was killing my child." These words are alleged as the plaintiff's second cause of action.

The husband of the witness last referred to testified that defendant said to him: "I should take another doctor; he would not have him for a dog; he wouldn't have him doctor a dog; he says, 'If I were you I would go for another doctor right off because he is nothing but a butcher, and I shall do all the harm for him because he doctored a child of mine, and if I hadn't got another doctor in he would have killed her.'" These words are alleged as the third cause of action.

A brother of the last witness testified that defendant said to him: "Well, I told Mrs Snyder to get another doctor, if she

Statement of case.

don't she will be the murderer of her own child ; he doctored in my own family, and if I hadn't got another doctor my child would have died." These words are alleged as the fourth cause of action.

Another witness testified that defendant said : " He, (plaintiff) did attend in my family, but I had him for Mattie, and he nearly killed her ; if I hadn't let him go he would have killed her ; I wouldn't have him to a dog ; he is no good." These words are alleged as the fifth cause of action.

A witness testified that the defendant said to him : " I had better tell Mrs. Chapin if she wants to get better she had better get another doctor ; that he would not have him attend a dog ; that he had him attend his child and if he had not got another doctor his child would not have lived ; I afterwards went to Mrs. Chapin and told her." These words are alleged as the sixth cause of action.

Further facts appear in the opinion.

Wm. J. Gayner for appellant. The words used are not slanderous *per se*, and the complaint alleges no special damage, nor was there any attempt to prove such damage, plaintiff therefore is not entitled to recover. (*Foot v. Brown*, 8 Johns. 64 ; *Poe v. Mendford*, Cro. Eliz. 620 ; *Camp v. Martin*, 23 Conn. 86 ; *Carroll v. White*, 33 Barb. 615) The words used were susceptible of a meaning not slanderous *per se*, interpreted by the accompanying words and circumstances, and it was therefore for the jury to determine what was meant by them. (*Cooper v. Greeley*, 1 Denio, 347-58 ; *Hayes v. Ball*, 72 N. Y. 418.) The proof of these slanderous charges to be admissible must be repetitions of the alleged slander. (*Root v. Loundes*, 6 Hill, 518 ; *Frazier v. McCloskey*, 60 N. Y. 337 ; *Keenholts v. Becker*, 3 Denio, 346 ; *Washburn v. Cooke*, id. 110 ; *Diston v. Rose*, 96 N. Y. 122.) The charge that a certain allegation in the answer might be considered to enhance damages, if inserted wantonly, or without probable cause was error. (*Odgers on Slander*, 485, 542 ; *Starkie on Slander*, § 579 ; *Klinck v. Colby*, 46 N. Y. 427.)

Statement of case.

W. M. Rosebault for respondent. The motions to dismiss the several causes of action set forth in the complaint, made at the beginning of the trial, at the close of the plaintiff's case, and at the close of the whole testimony, were all properly overruled, (*Ward v. Kilpatrick*, 85 N. Y. 417; *Hays v. Bull*, 72 id. 418.) The defamatory language set forth in the first count of the complaint is clearly slanderous *per se*. (*Carroll v. White*, 33 Barb. 615; 42 N. Y. 161; *Secor v. Harris*, 18 Barb. 425; *Edsall v. Russell*, 43 Eng. Com. Law, 560; *Slotting v. Newman*, 26 Ala. 300; *Hays v. Hays*, 1 Humphreys, 402; *Ecart v. Wilson*, 10 S. & R. 24; *Johnson v. Robertson*, 17 Ala. 486; *Lynde v. Johnson*, 39 Hun, 13; *Carroll v. White*, 33 Barb. 615; *Sumner v. Utley*, 7 Conn. 257; *Tutley v. Allewine*, 11 Mod. 221; *Secor v. Harris*, 18 Barb. 425; *Edsall v. Russell*, 4 Man. & Gr. 1090; *Sumner v. Utley*, 7 Conn. 257; *Watson v. Vanderlugh*, Heltey's Rep. 71.) The exception to the charge of the court: "To that part which says that the words 'that he would kill the patient if he remained,' would be slanderous *per se*," is untenable. (*Walbrath v. Nellis*, 17 How. 72; *Linde v. Johnson*, 39 Hun, 13; *Carroll v. White*, 33 Barb. 615; *Bourreseau v. D. E. Journal*, 30 N. W. Rep. 376; *Donaghue v. Gaffy*, 7 Atl. Rep. 552; *Croswell v. Weed*, 25 Wend. 621; *Nuller v. McKesson*, 73 N. Y. 195; *Port Jervis v. F. Nat. Bank*, 96 id. 560; *Dillon v. Cockroft*, 90 id. 649; *Ormes v. Dauchy*, 82 id. 443; *Winchell v. Hicks*, 18 id. 558; *Provost v. McEnroe*, 102 id. 650; *Stratford v. Jones*, 97 id. 586; *O'Neill v. James*, 43 id. 84; *King v. U. S. L. Ins. Co.*, 20 Wkly Dig. 204; *Smedis v. B. & R. C. R. R. Co.*, 88 N. Y. 13; *Barrett v. Delano*, 14 Atl. Rep. 288; *Hullshaw v. G. B. etc. R. R. Co.*, 32 N. W. Rep. 529.) The objections to questions concerning plaintiff's reputation for skill and competency were properly overruled. (*Ward v. Kilpatrick*, 85 N. Y. 417; *Lewis v. Chapman*, 19 Barb. 252.) The conversation between the defendant and Mrs. Chapin was proper. (*Daley v. Berne*, 77 N. Y. 187; *Distin v. Rose*, 69 id. 122.) The testimony concerning defendant's offers to bribe the wit-

Opinion of the Court, per FOLLETT, Ch. J.

ness Chapin, not to appear on the trial of this action and testify against him, was proper as an admission of guilt. (*Moriarty v. L. C. & D. Co.*, L. R. [5 Q. B.] 314; *Stephens' on Evidence*, chap. 2, art. 7; *Bemis v. Kyle*, 5 Abb. [N. S.] 232; *Donohue v. People*, 56 N. Y. 208.) The evidence of a repetition of the slanderous charge of incompetency before suit brought, was competent to show malice. (*Daly v. Byrne*, 77 N. Y. 187; *Distin v. Rose*, 69 id. 122.) The motions to strike out testimony of expressions as uttered by defendant were properly denied. (*Distin v. Rose*, 69 N. Y. 122; *Desmond v. Brown*, 4 Am. Rep. 194; *Coleman v. Playstead*, 36 Barb. 26.) The testimony offered that in a particular case plaintiff had shown a want of medical knowledge, was inadmissible, because the specific fact which the defendant professed to be able and offered to prove, had not been pleaded. No ground was stated for the objections to the inquiry as to the plaintiff's reputation for skill and competency. (*Ward v. Kilpatrick*, 85 N. Y. 413, 417.) No justification was established. (*Fero v. Kosceo*, 4 N. Y. 162, 165.) The exception to that part of the charge which says that damages may be given for public security, was good. (*Brooks v. Harrison*, 91 N. Y. 92; *Voltz v. Blackmar*, 64 id. 44.)

FOLLETT, Ch. J. Many of the statements testified to by the witnesses, and which the jury must have found were made by the defendant, imputed, not a lack of skill in a particular case, but general ignorance of medical science, incompetency to treat diseases and a general want of professional skill. Such statements made in respect to a practicing physician are slanderous and actionable without proof of special damages. (*Secor v. Harris*, 18 Barb. 425; *Fitzgerald v. Redfield*, 51 id. 484; *Bergold v. Puchta*, 2 T. & C. 532; *Lynde v. Johnson*, 39 Hun, 12; *Southee v. Denny*, 1 Exch. 196; Towns. L. & S. [4th ed.] § 193; *Folk. Stark.*, § 88; 15 Am. L. Rev. 573; 19 Am. L. Reg. [N. S.] 465.) The point is made that defendant's statements all referred to the plaintiff's treatment of defendant's child, or that, at least, it was a question of fact for the jury to

Opinion of the Court, per FOLLETT, Ch. J.

determine whether they were not made solely with reference to that particular case. Much of the language proved to have been spoken did not refer to the treatment of the child, but related to the plaintiff's general competency and fitness to practice as a physician, and so it is quite unnecessary to consider whether statements disparaging the treatment of a particular case are, or are not, actionable without proof that special damages were caused by the words spoken.

The defendant denied in his answer the speaking of the words charged in the complaint, and alleged in mitigation that he described to three persons the plaintiff's unskillful treatment of his child, but that the words were not spoken maliciously, and further alleged: "In further mitigation of damages defendant says that plaintiff is not sufficiently nor ordinarily skillful nor competent as a physician, and has no reputation as a competent physician, and never had." The defendant neither gave nor offered any evidence in support of this allegation. In response to a request to instruct the jury that they might consider this allegation, and the defendant's failure to attempt to prove it, upon the question of damages, the court read the allegation, and said: "If you believe the imputation in the answer upon the plaintiff's professional competency is unproved, and was inserted maliciously and without probable cause, you may consider such imputation in aggravation of the damages. They had a right to plead that issue. If they fail on it and it was inserted in good faith, that would not tend to enhance the damages. But it remains on record, and if you find that it was put in wantonly and without cause, then you may consider that an aggravation of damages." To this instruction the defendant excepted, and now insists that it was erroneous, citing, in support of his contention, *Klinck v. Colby* (46 N. Y. 427). In that case it was held that a plea of justification, and the failure of the defendant to attempt to sustain it, was insufficient evidence to warrant a finding that a *prima facie* privileged communication was composed and published maliciously; and it was further held that: "In an action for libel, where, under an answer proper to the end, the defendant has shown that the

Opinion of the Court, per FOLLETT, Ch. J.

communication was privileged, his further answer of justification by the truth of the charge, though without proof given to sustain it, may not be taken into consideration of evidence of malice and in aggravation of the damages." In reaching these conclusions the learned judge made some observations which have led to the understanding that the court intended to lay down a general rule that no unsustained plea of justification could, under any circumstances, be considered by a jury in determining the amount of damages which a plaintiff might recover in an action for defamation of character. But that it was not the intention of the court or of the learned writer of its judgment to lay down a rule so broad as has been claimed, is made apparent, we think, by reference to the judgment rendered six years later in *Distin v. Rose* (69 N. Y. 122). In that case, an action for slander, the defendant charged the plaintiff with being a prostitute, and, among other defenses, justified the charge in his answer; but on the trial he failed to sustain his plea of justification, though he gave evidence tending to show that the plaintiff lived with a man as his wife, with knowledge that he had a wife living. The court was requested to charge: "There was nothing in the defendant's answer to enhance the plaintiff's damages." To which the court answered: "That is for the jury to say." An exception was taken, the validity of which was considered by the court. In considering this exception, the court said: "The words proved to have been spoken imputed unchastity by the most offensive epithets. The answer alleged in express terms that the charge was true, and then specified facts that she had lived with a man as his wife, knowing that he had at the time another wife living. If there was an entire failure of proof to sustain the charge, and the jury believed that it was inserted in the answer wantonly or maliciously, and without probable cause for believing it true, they might consider it upon the question of damages, and it was right, therefore, to decline, as matter of law, to charge that they could not so consider it. There was no intimation in this refusal that in this case they ought to so consider it, and the charge on the contrary intimated that the facts proved

Opinion of the Court, per FOLLETT, Ch. J.

ought to be considered in mitigation of damages." Five of the judges who sat in *Klinck v. Colby*, including the writer of the opinion, sat in the case last cited, and we cannot assume that the judgment in the first case was unknown to the court, or that it was regarded as in conflict with its decision in the latter case. The same rule was laid down in *Bennett v. Matthews* (64 Barb. 410), and its existence was not denied in *Doe v. Roe* (32 Hun, 628), but it was held inapplicable to that case because the evidence tended strongly to show that the defendant did not interpose the justification maliciously, but in good faith. Before the Code, the rule was vigorously stated and applied in *Fero v. Ruscoe* (4 N. Y. 165). It has been uniformly held, before and since the Codes, that when a defendant pleads in justification of the breach of his promise to marry, that the plaintiff has become unchaste, and on the trial makes no attempt to prove his plea, the fact may be considered by the jury in assessing the damages. (*Southard v. Rexford*, 6 Cow. 255; *Kniffen v. McConnell*, 30 N. Y. 285; *Thorn v. Knapp*, 42 id. 474.)

None of the cases cited are decisive of the question under consideration, for, as is urged by the learned counsel for the appellant, the allegation quoted from the answer falls short of a justification, and is, at most, but a plea in mitigation. It is urged that pleas in mitigation being authorized by the Code, cannot be considered on the question of damages. The interposition of pleas in justification is authorized by law, nevertheless, as we think we have shown, courts have quite uniformly held, that if they were interposed in bad faith, the jury might consider the fact on the question of damages. The authorization by the Code, of pleas in mitigation is not a license for their interposition in bad faith, and for the purpose of injuring the reputation of the plaintiff, and when they are interposed for that purpose, the fact may be considered by the jury.

Two physicians, who were sworn in respect to other questions, were permitted to testify that the plaintiff was reputed to be a competent and skillful physician. This was objected to by the

Statement of case.

defendant, but no ground having been stated, the exception is not available.

No error was committed in permitting the plaintiff to show that between the date when the cause of action arose and the date when the action was begun, the defendant repeated the charges on occasions other than those set forth in the complaint; nor was there any error committed in permitting the plaintiff to show that defendant had attempted to hire one of plaintiff's witnesses to leave the country.

The judgment should be affirmed, with costs.

All concur, BRADLEY and HAIGHT, JJ., in the result.

Judgment affirmed.

JOSEPH L. HABERSTRO, Respondent, v. JOHN M. BEDFORD et al.,
Appellants.

It seems where, in an action upon a bond or undertaking taken by a sheriff, a defense is interposed, based on the statutory provision (2 R. S. 286, § 59) prohibiting that officer from taking any bond, obligation or security "by color of his office in any other case or manner than such as are provided by law," the defense is not met by proof that the instrument was taken at the instance of the defendants; its validity or invalidity is not dependent upon the question as to whether it was extorted or voluntarily given.

Where an undertaking given to discharge a defendant from arrest, in an action for embezzlement, instead of being in precise compliance with the provisions of the Code of Civil Procedure in reference thereto (§ 575), followed the requirements of the Code of Procedure (§187); and so, in excess of the present statutory requirements, contained the condition that defendant would render himself amenable to the process of the court during the pendency of the action, *held*, that the word "process" as used referred only to such mandates of the court as are issued to enforce a decree or judgment; that as no process could be issued against defendant prior to the rendition of judgment, the extra condition added in no degree to the statutory obligation; and so, might be disregarded as surplusage.

It seems the intent of the provision of the Code of Procedure was to provide for bail in both legal and equitable actions; the provision that defendant would render himself amenable to process during pendency of the action being intended to be applicable only to actions for equitable

Statement of case.

relief, wherein an order of arrest in place of a writ of *ne exeat* had been issued.

Where the sureties to such an undertaking are excepted to and refuse to justify, it is not the duty of the sheriff to take active measures, such as rearresting the defendant, to relieve them from liability; nor can the sureties surrender their principal and so relieve themselves from further responsibility, and a certificate of the sheriff that they have surrendered, does not, in the absence of proof that they relied thereon, and by reason thereof have sustained injury, estop that officer from asserting their liability to him as fixed by the Code of Civil Procedure. (§ 589.)

After the discharge of a defendant from arrest on giving an undertaking, and after failure of the sureties to justify, the defendant was, by virtue of a County Court order in proceedings instituted in part upon the affidavits of one of the sureties, taken by the sheriff, to an inebriate asylum; that officer having been advised by his counsel that it was his duty to obey the order, and if he failed so to do he would be guilty of contempt. The order was in fact void. While defendant was in the asylum an execution against his person was issued to the sheriff and returned by him unsatisfied. Thereafter the defendant was brought back from the asylum and taken into custody by the sheriff, who by advice of counsel accepted an undertaking from him and discharged him from arrest. Subsequently the sheriff took various steps for the purpose of procuring the exoneration of himself as bail and the relief of the sureties in the original undertaking, by advice of their counsel and his own, and at the request of one of said sureties, he promising to pay the expense incurred. In an action by the sheriff against said sureties, *held*, their omission to justify rendered them liable; that plaintiffs action in obeying the void County Court order, and in attempting to relieve them and himself, although he made a mistake and was ill-advised, furnished no defense; that he had a right to rely upon the indemnity furnished by defendants undertaking, and was not required to take any affirmative action to relieve them.

Reported below (43 Hun 201).

(Argued November 25, 1889; decided January 14, 1890.)

APPEAL from order of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made January 24, 1887, which affirmed a judgment in favor of plaintiff entered upon a verdict upon trial in the Superior Court of Buffalo and affirmed an order denying a motion for a new trial.

Alice Douglas commenced an action January 7, 1879, against one William F. Warren to recover the sum of \$1,078.93 alleged by her to have been fraudently misapplied and embezzled by

Statement of case.

him. Pursuant to an order of arrest granted on the same day the defendant Warren was arrested by the plaintiff. He was discharged from such arrest after executing and delivering to the sheriff an undertaking in which the appellants joined. Such undertaking was not in the form prescribed by section 575 of the present Code but was in the form provided by section 187 of the old Code. By this writing Warren, as principal, and the appellants, as sureties, bound themselves jointly and severally that Warren should at all times render himself amenable to the process of the court during the pendency of the action and to such as might be issued to enforce the judgment therein. On January 16, 1879, the plaintiff in that action excepted to the form and sufficiency of the undertaking and also to the sufficiency of the sureties. The sheriff gave the sureties notice requiring them to appear and justify but they failed to do so. Alice Douglas perfected judgment in such action against the defendant Warren for \$1,243.06 March 7, 1879, and on the same day issued and delivered to the plaintiff an execution thereon against the property of Warren which was returned wholly unsatisfied March 15, 1879.

Pursuant to an order made by the county judge of Erie county, based in part upon the affidavit made by the defendant Bedford, the plaintiff, as sheriff of Erie county, by one of his deputies, on the 10th day of March, 1879, removed Warren from Erie county to an inebriate asylum in Broome county, and there placed him in care and custody of the officers of the asylum. There he was confined until April 15 following, when the plaintiff, by one of his deputies, in accordance with an order made by the county judge of Erie county, took him from such asylum to the county jail of Erie county, where he was confined. While Warren was in the asylum at Binghamton, and on March 17, 1879, an execution against his person was issued on the Douglas judgment and placed in the hands of the plaintiff as sheriff. Such execution was returned unsatisfied on the third day of April following. Before Warren was brought back from the asylum at Binghamton, and on April 10, Mrs. Douglas commenced an action in the Supreme

Statement of case.

Court against the plaintiff to recover the amount of her judgment against Warren, which resulted in a judgment in her favor for \$2,005.38 on May 31, 1884. From April 15 until April 23, 1879, Warren remained a prisoner in the actual close custody of the plaintiff. Upon the latter date an instrument in writing was executed by Warren, as principal, and Henry W. Box and Joseph V. Seaver, as sureties, conditioned that said Warren should at all times render himself amenable to the process of the court during the pendency of the action wherein Alice Douglas was plaintiff and William F. Warren defendant, and to such as might be issued to enforce the judgment therein, was delivered to the plaintiff and on that day he was discharged from custody. On April 29, following, the plaintiff, through one Isaac Scot, then a coroner of Erie county, again took Warren into actual close custody in his own exoneration as bail of said Warren. He was discharged from imprisonment on the same day upon the receipt by plaintiff of an instrument in writing executed by Warren as principal and the same sureties as before, conditioned that Warren should at all times render himself amenable to the process of the court during the pendency of the action of Douglas against Warren. April 30, 1879, the plaintiff moved for his own exoneration as bail. The motion was granted by the Special Term, but the General Term reversed the order, the Court of Appeals subsequently affirmed the order of the General Term. After the plaintiff's term of office had expired he again caused Warren to be imprisoned and thereafter moved for his own exoneration as bail, which the Special Term granted on conditions. The General Term reversed the order of the Special Term which order was subsequently affirmed by the Court of Appeals. The plaintiff thereafter commenced this action to recover the damages which he claimed to have sustained by reason of the refusal of the defendants, as sureties, to justify on the undertaking given in the action of Douglas against Warren, and also to recover the costs, expenses and disbursements incurred in the defense of the action brought against him, and in the proceedings taken in exoneration of himself as bail upon

Statement of case.

the ground that such defense had been interposed, proceedings taken and costs and expenses incurred, at the request and upon the agreement of the defendants to reimburse him.

The trial court directed a verdict in favor of the plaintiff and against the defendants for \$1,686 the amount of the judgment recovered with the interest thereon, in *Douglas v. Huberstro*. As to the items of costs and expenses incurred in conducting the several proceedings for exoneration and in defending the action of *Douglas v. Huberstro*, the court held that there was no evidence justifying a recovery against the defendant Phillips and submitted to the jury for their determination as to whether the defendant Bedford had requested the sheriff to incur such expense and had agreed to reimburse him. The jury found in favor of the plaintiff on that issue, and judgment was entered accordingly.

Truman C. White for appellant. As sheriff of Erie county, the plaintiff was the chief executive officer of all courts of record within his county, and bound by statute, as well as at common law, to execute all their mandates and conform all his acts to the law and practice of those courts. (Crocker on Sheriffs, § 26, 148; 3 Chitty on Practice, 45, 46; Tidd on Practice, 48; 2 R. S. [7th ed.] 967, § 75.) The instrument executed by the appellants with William F. Warren on January 7, 1879, was void and created no liability on the part of the appellants. (Code Civ. Pro., § 575, subdiv. 1; Greenwood on Public Policy, 311; *Toles v. Adee*, 84 N. Y. 222, 234; Crocker on Sheriffs, § 764.) The respondent cannot charge the appellants "with consequences, which if he had acted with reasonable diligence, might have been prevented." (*In re Cornell*, 18 N. Y. S. R., 206; *Woolsey v. Finke*, 17 N. Y. S. R. 627; *Woodmansee v. Kinnicutt*, 20 N. Y. Wkly Dig., 512; *Hamilton v. McPherson*, 28 N. Y. 72.) When the respondent confined Warren in jail on April 14, 1879, he was entitled, as matter of right, to exoneration. It constituted a valid surrender by the respondent in his own exoneration as bail, and he should thereafter have detained him until dis-

Opinion of the Court, per FOLLETT, Ch. J.

charged according to law. (1 Wait's Practice, 672; *Sartos v. Merceques*, 9 How. Pr. 188; *Brady v. Drundage*, 59 N. Y. 310; Code of Civ. Pro., §§ 110, 149; *Thomas v. Bartow*, 48 N. Y. 200; 1 Parsons on Contracts, [6th ed.] 446, 2 id. 798; *Rutgers v. Lucet*, 2 John. Cas. 92; *Douglas v. Haberstro*, 21 Hun, 320; 82 N. Y. 611.

Adelbert Moot for respondent. The plaintiff is entitled to recover \$1,686 against both the defendants as a matter of law upon the undisputed facts of this case. (*Arteaga v. Connor*, 88 N. Y. 403; Code of Pro., §§ 186, 589; *Clapp v. Schutt*, 44 N. Y. 104; *McKenzie v. Smith*, 48 id. 143; *Baker v. Curtiss*, 2 Abb. Pr. 279; *Towl v. Alford*, 64 Barb. 568; *Van Duyn v. Koch*, 1 Hill, 558; *Cozine v. Walter*, 55 N. Y. 304; *Village of Port Jervis v. F. Nat. Bk.*, 96 id. 550; *Brady v. Brundage*, 59 id. 310; *Willett v. La Salle*, 19 Abb. Pr. 272; Code, § 589; *Chamberlain v. Preble*, 11 Allen, 374; *Miner v. Clark*, 15 Wend. 427; Rowle on Covenants, 200; *City of Rochester v. Montgomery*, 72 N. Y. 65; Bigelow on Estoppel [3d. ed.], 84.) The verdict and judgment are right upon the facts. (*Metcalf v. Striker*, 31 N. Y. 225; Code, §§ 587, 595; *Douglas v. Haberstro*, 19 Hun, 1; *Clapp v. Schutt*, 44 N. Y. 104; *Douglas v. Haberstro*, 88 id. 611; *Goodwin v. Bunzell*, 18 J. & S. 441; *Winter v. Kinney*, 1 N. Y. 365; *Dubois v. Hermance*, 56 id. 674; *Hastie v. DePeyster*, 3 Caines, 190; *N. Y. M. Ins. Co. v. P. Ins. Co.*, 1 Story, 458; *Kip v. Brigham*, 7 Johns. 168; *Rockfeller v. Feller*, 8 Cow. 623; *Kettle v. Lepe*, 6 Barb. 467, 469; *N. Y. C. Ins. Co. v. Nat. P. Ins. Co.*, 20 id. 476, 477; *Spark v. Heslop*, 28 L. J. [N. S.] 197; Sedg. on Dam. 326-331; 2 id. 36-44; *Brown v. Nichols*, 42 N. Y. 26; *Devlin v. Smith*, 89 id. 470.) The plaintiff is not estopped from asserting the liability of defendants. (*Plumb v. C. C. M. Ins. Co.*, 18 N. Y. 394, 395; *Chipman v. Gates*, 54 id. 132; *Makenzie v. Smith*, 48 id. 143; *Julliard v. Chaffee*, 92 id. 529; *Chamberlain v. Preble*, 11 Allen, 370; *Connor v. Reeves*, 103 N. Y. 527; 88 id. 611.) It is now too late for Bedford and Phillips to urge that the undertaking upon

Opinion of the Court, per PARKER, J.

which they obtained the release of Warren by Haberstro as sheriff was void, and, therefore, they are not liable for anything in this action. (*Toles v. Adees*, 84 N. Y. 224; 91 id. 562; *Goodwin v. Bunzel*, 102 id. 224; *Carr v. Sterling*, 114 id. 588; Bigelow on Estoppel [3d ed.], 479; *Konitzky v. Meyer*, 49 N. Y. 571; *Chicago v. Robins*, 4 Wall. 658; *Village of Port Jervis v. Bank*, 96 N. Y. 550; Freeman on Judgments, §§ 181, 184, 249; *Smith v. Smith*, 79 N. Y. 634; *Jordan v. Van Epps*, 85 id. 436; *Clemens v. Clemens*, 37 id. 74; *Bloomer v. Sturges*, 58 id. 176; *Collins v. Bennett*, 46 id. 490; 88 N. Y. 611; 25 Hun, 262, 263; 21 id. 320; 82 N. Y. 572; *Toll v. Alvoord*, 64 Barb. 568; *Connor v. Reeves*, 103 N. Y. 527.) The court correctly decided that it could permit the plaintiff to amend his complaint, as it could have permitted an amendment to a bill of particulars, by adding another item of expense to the items of expense specified in the complaint; and as defendants did not show surprise or mistake, no injury resulted to defendants therefrom. (Code Civ. Pro., § 723; *Melvin v. Wood*, 3 Keyes, 533; *Hall v. Gould*, 13 N. Y. 127; *Dennis v. Coman*, 61 id. 642; *Knapp v. Roche*, 62 id. 614.)

PARKER, J. The first question requiring consideration involves the validity of the undertaking executed by Warren as principal with the defendants as sureties and by them delivered to the sheriff. The sureties were financially responsible, and upon such execution and delivery, accompanied with a demand that Warren be released from custody, he was discharged. It is now contended that the undertaking was void, because it contained a provision not authorized by section 575 of the Code of Civil Procedure. Warren was entitled to be discharged from custody upon giving an undertaking in compliance with subdivision 3 of such section which provides that "the defendant will at all times render himself amenable to any mandate which may be issued to enforce a final judgment against him in the action."

The undertaking given was conditioned that the defendant "shall at all times render himself amenable to the process of

Opinion of the Court, per PARKER, J.

the court during the pendency of the above entitled action, and to such as may be issued to enforce the judgment therein." It will be observed that the undertaking was in accord with the requirements of section 187 of the old Code, for which section 575 of the present Code is a substitute. The condition embraced in the undertaking in excess of the statutory requirement is therefore that the defendant shall render himself amenable to the process of the court during the pendency of the action. It is insisted that by reason thereof the undertaking is void, within the statute which provides that "no sheriff or other officer shall take any bond, obligation or security by color of his office, in any other case or manner than such as are provided by law. And any such bond, obligation or security taken otherwise than as herein directed shall be void." (2 R. S. 286, § 59.)

The decision of this court in *Toles v. Ade*e (84 N. Y. 224); *Goodwin v. Bunzl* (102 id. 224), and *Carr v. Sterling* (114 id. 588) cannot be invoked in support of the validity of the undertaking in question.

In each of those cases there was denied to the instrument in writing, any validity as a statutory undertaking, but it was held under the circumstances proven to constitute a valid common law agreement between the parties to the action, and enforceable as such, between themselves. In this case the undertaking cannot be regarded as an agreement between the parties to the action, for the plaintiff instead of agreeing to accept the undertaking specifically objected to its form and sufficiency. This plaintiff in his official capacity accepted the undertaking. His right to receive it as a condition precedent to the discharge of the defendant in the action was controlled by a statute designed to prevent extortion and oppression by officers of prisoners in their custody. This statute is enforced by the courts with great strictness. (*Barnard v. Viele*, 21 Wendell 88; *Bank of Buffalo v. Boughton*, id. 57).

It is no answer to the allegation of invalidity based upon the statute, that the illegal security was taken at the instance of the defendant. Its validity or invalidity is not dependent on

Opinion of the Court, per PARKER, J.

the circumstance whether it was extorted or voluntarily given. (*Toles v. Adee*, 84 N. Y. 222).

If, then, the words not properly embraced in the undertaking imposed any burden in addition to that authorized by law, (Code, § 575, subdiv. 3) it is void and of no effect. (*Cook v. Freudenthal*, 80 N. Y. 202.) Inasmuch as the undertaking contains all of the statutory requirements, we are to determine whether the additional words are of substance or not. If properly construed they add in any degree whatever to the statutory obligation, then they must be deemed to be of substance and the undertaking held to be void. Otherwise they may be treated as surplusage and disregarded. The statute required Warren to give an undertaking conditioned that he would render himself amenable to any mandate issued to enforce a final judgment against him in the action. The unauthorized provision therefore did not add to or affect the liability of the defendant, or his sureties after judgment rendered. And as this is an action at law for the recovery of money only, the order of arrest being based upon the assertion of a fraudulent misappropriation of money, it is not apparent how any process could issue against him prior to the rendition of judgment. The word process in the connection in which it is used in this undertaking has a well understood meaning. It has been determined by frequent use and practical construction in courts of equity to relate only to such mandates of the court as are issued to enforce a decree or judgment in an action. While a subpoena issued to compel attendance of a witness, or an order punishing for contempt of court one who refuses to discover books or papers on a trial, are within the general legal definition of the word process, they are not legitimately included within its scope and meaning in the relation which it bears to the words under consideration.

The holding that such words are without force and meaningless when employed in an undertaking given in an action at law suggests the inquiry, why then were they a part of section 187 of the old Code? Must it not be presumed that the legislature intended that they should be effectual for some purpose?

Opinion of the Court, per PARKER, J.

It was evidently the intention of the code commissioners to abolish the writ of *ne exeat*, which courts of equity were accustomed to employ to prevent a party owing an act of justice to a fellow citizen, and to enforce which a suit had been instituted, from withdrawing himself from the jurisdiction of the court so that he could not be compelled by its process to abide its decree. In order to be discharged from an arrest made pursuant to the writ it was necessary to give bail that he would not "go, nor attempt to go, without the state without leave of the said Supreme Court." In this manner bail in purely equitable actions was frequently obtained.

The code commissioners having, as they undoubtedly supposed, put an end to the writ of *ne exeat* it became necessary to provide for bail in both legal and equitable actions. To that end section 187 of the old Code was evidently framed. It provided for an undertaking that would serve the purpose desired in both classes of actions.

The insertion of the provision that the defendant would render himself amenable to process during pendency, being especially intended to be applicable to actions for equitable relief. The fact that after much conflict of decision the weight of authority seems to be in support of the position that the writ was not abolished by the old Code does not affect the position taken. The purpose of the commissioners to do so, and the fact that section 187 was in part the result of an attempt to provide bail in such cases as the writ *ne exeat* was accustomed to issue is obvious. It appears to have been intended by the commissioners, therefore, that such provision would be effective in equitable actions only. Their purpose and intent in drafting such provision, and our view of its non-effect in an undertaking, otherwise regular, given in an action at law are therefore in accord.

We think it cannot be held to add any additional burden or duty in an action for the recovery of money only, for that no mesne process can issue requiring the defendant to do any act during the pendency of the action. Therefore it may be treated as surplusage and the legal quality of the instrument is not vitiated.

Opinion of the Court, per PARKER, J.

Immediately after the giving of this valid undertaking the bail was excepted to, and they failed to justify.

As a legal consequence of such omission the plaintiff became liable as bail. (Code Civ. Pro., § 587.) And the sureties in turn, accountable to him for the damages sustained by reason thereof. (Code Civ. Pro., § 589.)

But it is contended that the defendants are relieved from responsibility to the plaintiff because of the acts and omissions of plaintiff subsequent to their refusal to justify. While undoubtedly it was obligatory upon the sheriff to act in good faith toward these defendants, to do no act with the purpose of charging them with liability, we do not conceive it to have been his duty to take active measures to relieve them from responsibility. They had demanded Warren's release from custody upon the strength of an undertaking executed by them, and it cannot be said that thereafter it was incumbent upon him to arrest Warren for the purpose of affording relief to them.

Had the defendants justified as bail they would have had the right to surrender their principal, and thereby relieve themselves from further responsibility. They did attempt to make a final surrender of Warren while he was in custody, and on the 15th day of April, 1879, but because of their failure to justify, they were no longer bail, and entitled to the privileges incident thereto, and therefore such attempt was without effect. (*Clapp v. Schutt*, 44 N. Y. 154.)

An act of the defendants, unauthorized by law and without effect, cannot be asserted as a defense to plaintiff's claim. The acts of the plaintiff of which the defendants complain, and insist should release them from liability herein, are :

First. That Warren would have been found and taken in the execution issued against his person, but for the fact that previous to its issue he had been taken to the inebriate asylum at Binghamton by the plaintiff, through one of his deputies. It appears that Warren was so taken by virtue of an order of the county judge of Erie county. It was based in part upon an affidavit made by the defendant Bedford. The plaintiff

Opinion of the Court, per PARKER, J.

did not have personal knowledge of the attempt to remove Warren to Binghamton until after the making and delivery to him of the order of removal.

He then consulted his counsel who advised him that it was his duty to obey the order, and that if he failed to do so he would be guilty of contempt. The order was void and was so treated by the trial court :

Second. That the plaintiff, after having taken Warren into close custody and on the 24th day of April, 1879, accepted an undertaking from him and discharged him from arrest. It appears that the plaintiff took Warren into custody about April fourteenth. That on the next day the defendants attempted to make a final surrender of him to the sheriff in exoneration of themselves, which as we have observed was ineffectual for such purpose. Subsequently and by advice of counsel he accepted an undertaking from the debtor and discharged him from arrest.

Four days later he caused his re-arrest by the coroner. Such arrest was apparently made for the purpose of procuring the exoneration of the sheriff as bail.

Upon his application an order was granted by the Special Term to that effect. Such order was subsequently reversed by the General Term. After plaintiff's term of office had expired he surrendered Warren to the sheriff, and again moved for his exoneration as bail. The application was granted on terms, but the order was reversed by the General Term. It is not claimed that in what he did the plaintiff acted in bad faith, or with any design to charge the defendants with liability. On the contrary the trend of the evidence is to the effect that he acted by advice of his counsel and Mr. Hawks, counsel for the defendants, acting together. Indeed the jury have found that in defending the action of *Douglas v. Haberstro*, and in the taking of the subsequent proceedings in exoneration of himself as bail he acted at the request of the defendant Bedford, and upon his promise to pay all expenses incurred in connection therewith. Having then acted in good faith towards the defendants it cannot be held because plaintiff made a mistake,

Statement of case.

or was ill-advised, by both his own counsel and that of the defendants, as to the mode of procedure necessary to relieve himself from liability as bail, that thereby is created a defense for the defendants.

The omission of the defendants to justify rendered them liable to the plaintiff for the damages incurred.

He had a right to rely upon the indemnity furnished by their undertaking and was not required to take any affirmative action to relieve them from the liability created by their neglect. It is difficult to see, therefore, how proceedings taken with intent to relieve himself and the defendants as well from liability, because not effectual for the purpose desired, can be regarded and treated as a defense available to the defendants in this action.

In view of the circumstances surrounding the making of the certificate by the sheriff to the effect that Bedford and Philips had surrendered Warren, together with the absence of proof that defendants relied thereon and by reason thereof have sustained injury, we think the plaintiff is not estopped from asserting the liability of defendants.

The recovery against Bedford for expenses and disbursements incurred is not open for review in this court, the jury having found in favor of the plaintiff upon a conflict of testimony and the General Term having affirmed the judgment. The other exceptions taken do not call for a reversal.

The judgment should be affirmed.

All concur, except BRADLEY and HAIGHT, JJ., not sitting.
Judgment affirmed.

CHARLOTTE B. MILLER, Respondent, v. THE OCEAN STEAMSHIP
COMPANY OF SAVANNAH, Appellants.

118	199
158	271

In an action against defendant, a common carrier of passengers, to recover damages received by plaintiff, while a passenger upon one of its boats, it appeared that the injuries were caused by a break in apparatus wholly under defendants control, furnished and applied by it to secure in place a hawser used in turning the vessel around before landing,

Statement of case.

at a point where there was danger of serious injury to passengers if the apparatus gave way and the hawser recoiled. *Held*; that defendants' duty to its passengers was such as to require, under the circumstances, more than ordinary diligence for their protection; that the giving way of the apparatus raised an inference of negligence, and required evidence that the injury resulting came from no want of diligence on defendants' part. Also, *held*, the mere fact that the defective condition was not observed or apparent was not sufficient to effectually dispel the inference, if there were means available by careful examination or practical tests to discover the defect, that the requirements of the higher degree of care in such case is not necessarily dependent upon actual apprehension of danger, but on the dangerous consequences which are likely to result from defective appliances.

Also, *held*; that the failure of defendant's officers and employees having charge of the vessel to give timely warning to the passengers to enable them to avoid danger, which might have been anticipated, could be considered on the question of defendants negligence; it appearing that it was their custom to give such warning when a hawser was being used as on the occasion in question.

Kelly v. M. R. Co. (112 N. Y. 443), distinguished.

The injury was caused by the breaking of a stick used to hold a pulley-block through which the hawser passed. Plaintiff was allowed to prove under objections and exceptions that immediately after the accident the place of the stick was effectually supplied by one of the capstan bars which were near, and that the vessel was warped around to the dock. *Held*, no error.

(Argued December 2, 1889; decided January 14, 1890.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made March 2, 1887, which affirmed a judgment in favor of the plaintiff, entered upon a verdict.

The nature of the action and the facts are sufficiently stated in the opinion.

Nathan Bijur for appellant. It was error to deny the motions to dismiss the complaint made by the defendant after the close of the plaintiff's case, and also after all the testimony was in. (*Breen v. N. Y. C. & H. R. R. Co.*, 109 N. Y. 297; *Laffin v. B. & S. M. R. R. Co.*, 106 id. 136; *Kelly v. M. R. R. Co.*, 112 id. 443.) The court erred in admitting evidence that the capstan bars were used after the accident

Statement of case.

had occurred. (*Baird v. Daly*, 68 N. Y. 547; *Timpson v. M. R. R. Co.*, 1 N. Y. Supl. 674.)

Lucien Birdseye, for respondent. The motion to dismiss the complaint, made at the close of plaintiff's case, was properly denied. (*Colgrove v. N. Y. & N. H. R. R. Co.*, 20 N. Y. 492; *Sheridan v. B. O. & N. R. R. Co.*, 36 id. 39; *Deyo v. N. Y. C. R. R. Co.*, 34 id. 9; *Kennedy v. Mayor, etc.*, 73 id. 365, 366-7; *Putnam v. B. & S. A. R. R. Co.*, 55 id. 108, 112; *Thompson v. Lamley*, 1 Abb. [N. C.] 254; 64 N. Y. 631; *Heyne v. Blair*, 62 id. 19, 22-3; *Matteson v. N. Y. C. R. R. Co.*, 62 Barb. 364, 377-8; *Ireland v. O. H. & S. P. Co.*, 13 N. Y. 526, 533; *Ernst v. H. R. R. R. Co.*, 35 id. 9, 38-41; *Brown v. N. Y. C. R. R. Co.*, 34 id. 404; *Wolykield v. S. A. R. R. Co.*, 38 id. 49; *Hume v. Mayor, etc.*, 47 id. 639; *Laning v. N. Y. C. R. R. Co.*, 49 id. 521, 524; *Viner v. N. Y., etc., SS. Co.*, 50 id. 23-26; *Totten v. Plipps*, 52 id. 354; *Webber v. N. Y. C. R. R. Co.* 58 id. 451; *Massoth v. D. & H. C. Co.*, 64 id. 524; *Sewell v. City of Cohoes*, 75 id. 45-53; *Casey v. N. Y. C. R. R. Co.*, 78 id. 518, 521-2; *Stackus v. N. Y. C. & H. R. R. R. Co.*, 79 id. 464, 469; *Hart v. H. R. B. Co.*, 80 id. 622; *Payne v. T. & B. R. R. Co.*, 83 id. 572; *Harris v. Perry*, 89 id. 308, 311-2; *Kain v. Smith*, 89 id. 375, 384-5; *Holbrook v. U. & S. R. R. Co.*, 16 Barb. 113; 12 N. Y. 236; *Curtis v. R. & S. R. R. Co.*, 20 id. 282; 18 id. 534; *Bowen v. N. Y. C. R. R. Co.*, 18 id. 408; *Hegeman v. W. R. R. Co.*, 13 id. 9, 24; *Alden v. N. Y. C. R. R. Co.*, 26 id. 102; *Steinweg v. Erie R. Co.*, 43 id. 123; *Caldwell v. N. J. S. Co.*, 47 id. 282, 285, 288-290; *Brown v. N. Y. C. R. R. Co.*, 34 id. 404; *Maverick v. E. A. R. R. Co.*, 36 id. 378; *Simmons v. N. B. S. Co.*, 97 Mass. 361, 367-8; *P. & R. R. R. Co. v. Derby*, 14 How. [U. S.] 468, 486; *S. B. New World v. King*, 16 id. 469, 474; *Railroad v. Pollard*, 22 Wall. 341, 350; *P. Co. v. Roy*, 102 U. S. 451; *The City of Panama*, 101 id. 453, 462-3; *Hall v. C. R. S. B. Co.*, 13 Conn. 319; *Dudley v. Smith*, 1 Camp. 167; *Mauzy v. Talmadge*, 2 McLean, 157; *Stokes v. Saltonstall*, 13 Pets. 181,

Statement of case.

192; *Daniel v. M. R. Co.* L. R., [3 C. P.] 216, 591; *Christie v. Griggs*, 2 Camp. 79; *Farish v. Reigle*, 11 Gratt. 697; *Boyce v. C. S. Co.*, 25 Cal. 460, 467-9; *Holbrook v. U. & S. R. R. Co.*, 12 N. Y. 242; *Curtis v. R. & S. R. R. Co.*, 18 N. Y. 536; *Hart v. H. R. B. Co.*, 80 id. 622; *Dawson v. M. & R. Co.*, 5 L. T. [N. S.] 682; *Ware v. Gray*, 11 Pick. 106; *Christie v. Griggs*, 2 Camp. 79; *Stokes v. Saltonstall*, 13 Pets. 181; *McKinney v. Keil*, 1 McLean, 540; *Farish v. Reigle*, 11 Gratt. 697; *Stockton v. Frey*, 4 Gill 406; *Fairchild v. C. S. Co.*, 13 Cal. 599; *Boyce v. C. S. Co.*, 25 id. 460; *C. B. & Q. R. Co. v. George*, 19 Ill. 510, 517-8; *Yonge v. Kinney*, 28 Ga. 111; *Brown v. N. Y. C. R. R. Co.*, 34 N. Y. 404; *Sullivan v. P. & R. R. Co.*, 30 Pa. St. 234; *Wilkie v. Bolster*, 3 E. D. Smith 327; *Byrne v. Boadle*, 2 H. & C. 722; *Scott L. & D. Co.*, 3 id. 596; *Kearney v. L. etc., R. R. Co.*, L. R. [5 Q. B.] 411; L. R. [6 Q. B.] 759; *Lyons v. Rosenthal*, 11 Hun. 46; *Mullen v. St. John*, 57 N. Y. 567; *Payne v. T. & D. R. R. Co.*, 83 id. 572; *Hegeman v. W. R. R. Co.*, 13 id. 9; *Alden v. N. Y. C. R. R. Co.*, 26 id. 102; *Sharp v. Grey*, 9 Bing. 457; *Caldwell v. N. J. S. Co.*, 47 N. Y. 282, 287.) The motion made when both parties had rested, to dismiss the complaint, or direct a verdict in favor of defendant, was properly denied. (*Weaver v. Ward*, Hob. 134; *Moore*, 864; 2 Rolle Abr. 548; Whart. on Neg., §§ 114, 127, 128; S. R. on Neg., §§ 5, 59; *Center v. Finney*, 17 Barb. 94; *Lewis v. Smith*, 107 Mass. 334.) Plaintiff was not chargeable with contributory negligence. (*Johnson v. H. R. R. R. Co.*, 5 Duer, 21, 25, 6 id. 633, 641; 20 N. Y. 65; *Hackford v. N. Y. C. R. R. Co.*, 6 Lan. 381, 385-6; *Robinson v. U. P. R. R. Co.*, 48 Cal. 409, 426; *McQuilken v. C. P. R. R. Co.*, 50 id. 7; *P. C. Co. v. Bentley*, 66 Pa. St. 30; *Weiss v. P. R. R. Co.*, 79 id. 387; *Smoot v. Wetumka*, 24 Ala. 112; *Cockle v. L. & S. E. R. Co.*, L. R. [7 C. P.] 321; *Bridges v. N. E. R. Co.*, L. R. [7 H. L.] 213; *Robson v. N. E. R. Co.*, L. R. [10 Q. B.] 271; *Rose v. N. E. R. Co.*, L. R. [2 Eq. Div.] 248; *Matteson v. N. Y. C. R. R. Co.*, 62 Barb. 364; *Cleveland v. N. J. S. Co.*, 68 N. Y. 306, 309; *Stackus v. N. Y. C.*

Statement of case.

& *H. R. R. R. Co.*, 79 id. 464; *Ernst v. H. R. R. R. Co.*, 35 id. 26.) Proof of facts and transactions subsequent to the injury was proper. (*Waldele v. N. Y. C. & H. R. R. R. Co.*, 95 N. Y. 275; *Martin v. N. Y., N. H. & H. R. R. Co.*, 103 id. 626; *Rex v. Eriswell*, 3 Term R. 707; *Ellicot v. Pearl*, 10 Pet. 412, 432; *Ins. Co. v. Mosely*, 8 Wall. 397, 403-9, 409-419; *Packet Co. v. Clough*, 20 id. 528, 540-1; *V. & M. R. R. Co. v. O'Brien*, 119 U. S. 99; *Lund v. Tyngsborough*, 9 Cush. 36; *Durkee v. C. P. R. R. Co.*, 68 Cal. 533; 58 Am. R. 563, 565-8; *Dale v. D., L. & W. R. R. Co.*, 73 N. Y. 468, 472; *Brehm v. G. W. R. Co.*, 34 Barb. 256, 260-261; *Dougan v. C. T. Co.*, 56 N. Y. 8; *Salters v. D. & H. C. Co.*, 3 Hun, 338, 341; *King v. N. Y. C. R. R. Co.*, 4 id. 769, 776; *Payne v. T. & B. R. R. Co.* 11 id. 626; 75 N. Y. 45; *Hipsley v. K. C. S. J. & C. B. R. R. Co.*, 88 Mo. 348; *Baird v. Daly*, 68 N. Y. 548; *Corcoran v. The Village of Peekskill*, 108 id. 151; *Harvey v. N. Y. C. & H. R. R. R. Co.*, 19 Hun, 556, 558; *Painton v. N. Y. C. R. R. Co.*, 83 N. Y. 7; *Baldwin v. N. Y. & H. R. R. Co.*, 4 Daly, 314; *Hayman v. H. L. etc. Co.*, 58 N. Y. 53; *Casey v. N. Y. C. & H. R. R. R. Co.* 8 Daly 220; *Searles v. M. E. R. R. Co.*, 17 J. & S. 425; *Sheldon v. H. R. R. R. Co.*, 14 N. Y. 218; *Field v. N. Y. C. R. R. Co.*, 32 id. 339; *Westfull v. E. R. Co.*, 5 Hun, 76; *P. R. R. Co. v. Henderson*, 51 Pa. St. 315; *W. C. & P. R. R. Co. v. McElwee*, 67 id. 311, 314; *McKee v. Bidwell*, 74 id. 218, 225; *S. L. & S. F. R. R. Co. v. Weaver*, 35 Kas. 412; *A. T. & S. F. R. Co. v. Retford*, 18 Kas. 448-9; *City of Emporia v. Schmidling*, 33 id. 485; *Martin v. Towle*, 59 N. H. 31; *Nalley v. H. C. Co.* 51 Conn. 524; *Buel v. N. Y. C. R. R. Co.*, 31 N. Y. 314; *Twomley v. C. P. N. & E. R. R. Co.*, 69 id. 158; *Lubey v. H. R. R. R. Co.*, 17 id. 131; *Corcoran v. Village of Peekskill*, 108 id. 151; *Ernst v. H. R. R. R. Co.*, 39 id. 61; *Beisiegel v. N. Y. C. R. R. Co.*, 40 id. 9; *McGrath v. N. Y. C. & H. R. R. R. Co.*, 63 id. 522; *Casey v. N. Y. C. & H. R. R. R. Co.*, 8 Daly, 220; 6 Abb. [N.C.] 104; 78 N. Y. 518; *Sewell v. City of Cohoes*, 75 id. 45, 54; 1 Greenl. on Ev. chap. 5, § 113; Story on Agency, §§ 134,

Statement of case.

135, 136, 137, 138; *Fairlee v. Hastings*, 10 Ves. 122, 126-9; *Garth v. Howard*, 8 Bing. 451; *Thallheimer v. Brinckerhoff*, 4 Wend. 394, 397; *Bank of Monroe v. Field*, 2 Hill, 445; *Barker v. Binninger*, 14 N. Y. 271; *Luby v. H. R. R. Co.*, 17 id. 131; *Whittaker v. E. A. R. R. Co.*, 51 id. 295; *Anderson v. R., W. & O. R. R. Co.*, 54 id. 334; *Packet Co. v. Clough*, 20 Wall. 528; *Hamilton v. N. Y. C. R. R. Co.*, 51 N. Y. 109; *Card v. N. Y. & H. R. R. Co.*, 50 Barb. 39; *Maury v. Talmage*, 2 McLean, 157, 159, 160.) The court properly refused all the defendant's requests to charge, which were refused. (*Carpenter v. Stillwell*, 11 N. Y. 61, 79; *Caldwell v. Murphy*, 11 id. 416; *Oldfield v. N. Y. & H. R. R. Co.*, 14 id. 310, 315; *Keller v. N. Y. C. R. R. Co.*, 2 Abb. Ct. App. Dec. 481, 489; *Jones v. Osgood*, 6 N. Y. 233; *Hunt v. Maybee*, 7 id. 266, 273; *Winchell v. Hicks*, 18 id. 558, 565; *Gardner v. Barden*, 34 id. 433, 437; *Manertik v. E. A. R. R. Co.*, 34 id. 378, 382, 383; *Willetts v. S. M. Ins. Co.*, 45 id. 45, 49; *Filer v. N. Y. C. R. R. Co.*, 49 id. 47, 55; *Ransom v. N. Y. & E. R. R. Co.*, 15 id. 415; *Matteson v. N. Y. C. R. R. Co.*, 62 Barb. 364, 379; *Dyke v. E. R. Co.*, 45 N. Y. 113, 118; *Curtis v. R. & S. R. R. Co.*, 20 Barb. 282, 284; *Morse v. A. & S. R. R. Co.*, 10 id. 621; *Brignoli v. C. & G. E. R. R. Co.*, 4 Daly, 182; *Metcalf v. Baker*, 57 N. Y. 662; *Sheehan v. Edgar*, 58 id. 631; *Lincoln v. S. & S. R. R. Co.*, 23 Wind. 424; *Caldwell v. Murphy*, 1 Duer, 233; 11 N. Y. 46; *Foote v. Tracy*, 1 Johns. 53; *Aaron v. S. A. R. R. Co.*, 2 Daly, 127; *Minick v. City of Troy*, 19 Hun, 253; *Whelan v. N. Y., L. E. & W. R. R. Co.*, 38 Fed. Rep. 15; *Matteson v. N. Y. C. R. R. Co.*, 62 Barb. 364, 379-380; *Scott v. L. etc., D. Co.*, 3 H. & C. 596, 598; *Holbrook v. N. S. R. R. Co.*, 16 Barb. 113, 118; 12 N. Y. 236, 244; *Ernst v. H. R. R. R. Co.*, 35 id. 26; *Ochsenbein v. Shapley*, 85 id. 225; *Cleveland v. N. J. S. Co.*, 68 id. 309.) But even if there had been any single proposition contained in all these twenty-five requests to charge, as to which there was some technical error; still the judgment will not be reversed by reason thereof, because the charge, as a whole, and the eleven

Opinion of the Court, per BRADLEY, J.

propositions charged in accordance with defendant's requests, presented the case as fully and completely and favorably on behalf of the defendants as ought to have been done. (*Caldwell v. N. J. S. Co.*, 47 N. Y. 282.) There was no error in admitting or rejecting any of the evidence pointed out by any of the defendant's objections and exceptions to evidence. (*Culhane v. N. Y. C. & H. R. R. Co.*, 60 N. Y. 133; *McKeever v. N. Y. C. & H. R. R. Co.*, 88 id. 667.) The question of the excessiveness of plaintiff's damages is not open for discussion in this court. (Code Civ. Proc. § 190, subd. 2; *Oldfield v. N. Y. & H. R. R. Co.*, 14 N. Y. 310, 319; *Metcalf v. Baker*, 57 id. 662; *Peck v. N. Y. C. & H. R. R. Co.*, 70 id. 587, 592; *Gale v. N. Y. C. & H. R. R. Co.*, 76 id. 594; *S. Oil Co. v. A. Ins. Co.*, 79 id. 506, 510; *Kiff v. Youmans*, 86 id. 324, 327.)

BRADLEY, J. The action was brought to recover damages resulting from personal injuries suffered by the plaintiff, and alleged to have been occasioned by the negligence of the defendant. The latter was a corporation of the state of Georgia, and, as a common carrier of passengers, was the proprietor of and engaged in running a steamship, known as the City of Savannah, between the cities of New York and Savannah.

On March 10th, 1885, the plaintiff took passage at New York, for Savannah, on that vessel, which arrived at the latter place on the morning of the thirteenth of that month. The plaintiff was on the hurricane deck with several other passengers. A line was thrown out from the bow and secured to the wharf, with a view to turn the vessel around before landing. This was usual, and to accomplish it the flood tide in the Savannah river was relied upon, but when the vessel had turned so as to be about at right angles with the landing, her further progress in turning was interrupted by slack tide. The hawser was then brought into requisition to force her around, and for that purpose it was secured at the proper place on the dock, taken through the stern chock, and then carried along on the hurricane deck to the capstan on the bow, operated by an engine beneath

the deck, and to prevent the hawser coming in contact with the pilot-house, cabins, and other structures on the deck, it was necessary to guy the hawser away from them. This was done by putting it through a pulley-block with a loop in the starboard bow chock, held there by a toggle on the outside. The hawser thus placed ran along from the stern on the deck, near that side, to an through the block, and at little more than at right angles from there to the capstan, which was put in motion, and the force applied was such that the toggle suddenly gave way, and the hawser sprang forcibly back into line between its entrance at the stern and the capstan. The plaintiff was struck by it, knocked down, and the bones of one of her legs broken. This was not caused by any fault in the construction of the ship. It was well made, staunch, and fully manned. The defect which caused the calamity was in the character, substance, or condition of the toggle put into the loop to hold the block, through which the line passed, to its place; or, in the manner in which the toggle was put into the loop. The burden was with the plaintiff to prove negligence on the part of the defendant. In view of the danger of serious injury to passengers on the deck, which might result from failure to properly secure the hawser, with the strain upon it, to its place, the fact, when and as it appeared, that the accident was caused wholly by the defective condition of the means employed by the defendant and under its control, was sufficient to raise the presumption or inference of negligence on its part, and to call upon the defendant for explanation by evidence showing that the cause of the injury was consistent with the faithful discharge of its duty to those whose safety as passengers was intrusted to the care and diligence of the defendant's employees engaged in operating the vessel. (*Holbrook v. Utica & Schenectady R. R. Co.*, 12 N. Y. 236; *Hegeman v. Western R. R. Co.*, 13 id. 9; *Bowen v. N. Y. O. R. R. Co.*, 18 id. 408; *Caldwell v. N. J. Steamboat Co.*, 47 id. 282.) This the defendant sought to do, and gave evidence to the effect that, when it was found necessary to use the force applicable to the capstan on the bow to warp

Opinion of the Court, per BRADLEY, J.

the vessel around to the dock, the quartermaster was directed by the mate to go below and get a toggle; that he went into the hold of the vessel and there got, brought up, and used for the purpose, a stick of wood. Assuming that it was broken by the strain upon it, which the evidence tends to prove, it evidently was defective, but in what particular does not appear, because it fell into the water and was not recovered, nor was any effort made to recover it. There was, at the trial, another stick produced, which was by the quartermaster said to be similar in size and appearance to the one used, and in respect to that, expert evidence was given that it was sufficient in size and strength to sustain, as a toggle, the strain to which the other was or could have been subjected by the power applied, or applicable, to the capstan.

The defective stick used was taken from some wood in the hold used as dunnage, and how long it had remained there as dunnage does not appear, or whether for such use it had lain in water in the hold of the ship the evidence does not disclose other than by inference. The place there, where the stick was selected and from which it was taken, was not well lighted at the time, and it was just at daylight in the morning when it was brought out and used. There does not appear to have been any test applied to ascertain its condition, or inherent strength, but the information relied upon in that respect was dependent solely upon the appearance it furnished to the observation of the acting quartermaster, who obtained and used it for the purpose to which it was applied. He says it was Georgia pine, and he thought it sufficient for the toggle when he picked it out in the hold; and, that his opinion was the same after he brought it on deck. He also testified that he had seen toggles used a large number of times to haul vessels along the dock, but had before seen none used to warp a vessel around to the dock, as was done in this instance. It appeared that there were eyebolts about the vessel, and near the place of this bow chock, and into which the block may have been securely hooked, but it appears that the method of using a toggle was frequently adopted for the purpose of moving vessels

Opinion of the Court, per BRADLEY, J.

at their docks by force applied to lines or hawsers. And it may be assumed that such means were ordinary and therefore approved as suitable. It is in view of that fact, contended by the defendant's counsel, that upon the evidence there was no opportunity to find that the defendant was chargeable with negligence. The evidence as to the appearance of the stick used was mainly dependent upon the testimony of the quartermaster, who procured and applied it, although the mate saw it when it was brought on to the deck and placed in the loop. The other evidence on the subject was mostly secondary in character, and had relation to the stick produced upon the trial and said to be similar in appearance to the one used. That evidence was not necessarily descriptive of the condition of the latter, nor was the conclusion required that an examination of the sample disclosed what may have appeared by a close inspection of that which proved to be insufficient. It cannot be assumed that the quartermaster did not act in good faith in his attempt and purpose to supply a toggle of adequate strength to bear the strain which would be put upon it, but his relation to the transaction as the employe of the defendant was such as to bear somewhat, for the consideration of the jury, upon the question of his credibility. (*Dean v. Van Nostran*, 23 Wkly. Dig. 97.) Although the stick used was defective and unsuitable for the purpose, there would, upon the evidence, have been difficulty in charging the defendant with negligence, if its duty required the exercise of ordinary care only, because it did not appear affirmatively by the evidence that the defect, or want of strength for the use to which it was applied, was apparent to observation, but the recognized fact that danger of serious injury to the passengers on the portion of the deck, within the recoil of the hawser, likely to or which might result from it if it should break away from the guy, was such as to impose upon the defendant the duty to exercise something more than ordinary diligence for their protection. The cause of the injury arose from the apparatus wholly under the control of the defendant and furnished and applied by it. In such case the duty of the common carrier to its passengers is such as to raise the

Opinion of the Court, per BRADLEY, J.

inference of negligence, the relief from the imputation of which requires evidence that the injury resulting to them came from no want of diligence on the part of the carrier. And the mere fact that the defective condition was not observed or apparent, may not be sufficient to effectually dispel the inference, if there were means available by careful examination or practical tests to discover the cause of the infirmity in the defective appliance. (*Breen v. N. Y. C. & H. R. R. Co.*, 109 N. Y. 297.) Also see cases before cited.

It does not appear that force had ever before on this vessel been applied in the manner that it was on this occasion, or for the purpose of warping her around to the wharf. The vessel was two hundred and seventy feet in length, and her tonnage exceeded two thousand tons. With a slack tide and the tendency of the current down the river, it may be seen that great force was requisite to suddenly turn the ship by means of the line making the angles on its way from the dock to the capstan, that this one did when the power of the capstan engine was applied. It was apparent that very great strain would come upon the toggle. And it would be no answer if such were so, that the requisite strength of the appliance was not appreciated for the accomplishment of its purpose. Nor would it necessarily be sufficient for the party intrusted with its provision to say he thought it had the necessary firmness and tenacity to sustain what it would be required to bear. If such speculation were, as matter of law, sufficient to repel the permissible inference of negligence, responsibility might be quite easily avoided. There was no necessity for experiment on the occasion in question. Adequate means were at hand, sticks which may have been safely assumed to have the requisite strength for the toggle, and so far as appears, one of the eyebolts on the ship may have been effectually and safely used to hold the block. In view of the entire evidence upon the subject, the conclusion was permitted that the defendant failed to exercise the care and diligence fairly required of it; and that the injury to the plaintiff was occasioned by its negligence. This, upon the evidence, was

Opinion of the Court, per BRADLEY, J.

a question of fact properly submitted to the jury. The conclusion that the plaintiff was free from contributory negligence, was clearly warranted by the evidence. She was a cabin passenger, and entitled to access to any part of the ship suitable for passengers to go. The upper deck was usually made available to them. On this occasion, as the vessel was approaching the dock at Savannah, several passengers went upon this deck and were there at the time of the injury. It appears that the officers of the vessel, appreciating the danger which might result from the breaking away or severance of a line or hawser, when used on the deck to bring the vessel to the wharf, usually directed passengers to get and remain away from the place of such danger. There is evidence tending to prove that after the capstan was put in motion on this occasion an order was given by the captain, or master, to the mate to cause the passengers exposed to the danger, to move away from it, but before the order was executed the injury occurred. And by the evidence of the passengers, including the plaintiff, who testified on the subject, it appeared that no order or direction was heard in that respect. Nor can it be said, as matter of law, that the plaintiff was supposed or required, under the circumstances, to know or observe any danger of her situation in reference to the cause which produced the injury, or from any cause which the means employed in the use made of the hawser might furnish. The failure of the officers and employees having charge of the vessel to give timely warning to the passengers, to enable them to avoid the danger, may also have been entitled to some consideration on the question of negligence of the defendant. This usual precaution may and should have been observed and executed by those having the movement of the vessel in charge. The motions to dismiss the complaint were properly denied by the trial court.

Of the numerous requests to charge made by the defendant's counsel, only one, which the court refused, seems to be relied upon by him on this review. The one of the two propositions in that request, was, that "the vigilance and caution to be exercised in avoiding disaster should not necessarily be com-

Opinion of the Court, per BRADLEY, J.

mensurate with the danger that is imminent, but with the danger that is apprehended ; and the necessity of circumspection is qualified by the absence of those indications of peril which either precede or attend the approaches of harm." In the other proposition of the same request instruction was asked, that in determining whether the defendant was negligent the jury should inquire whether the accident was one which the men in charge of the vessel had any reason to apprehend, and for that purpose it was competent to consider that the evidence showed that the defendant had repeatedly, before the time in question, "performed in the very same manner, the very same operation during which this accident occurred, without accident or injury." The part here last stated of the proposition was not supported by evidence appearing in the record. It does not appear that ever before, the method and means adopted and applied in this instance were on this vessel used to warp her around to the dock, or that the hawser had before upon this vessel been placed on the deck supported by a guy and operated by the bow capstan for any purpose as was attempted to be done at this time. The court for that reason could not properly have charged fully as requested.

But the evident purpose of the request had relation to the degree of care imposed upon the defendant. The requirement of the higher degree of care is not necessarily dependent upon actual apprehension of danger, but upon the dangerous consequences which are likely to result from a defective condition of machinery and appliances where persons are so situated as to enable them to rely for protection upon the diligence of those having the control and operation of the means employed. This is especially applicable to common carriers of passengers, although injuries may result from causes from which danger may not be apprehended, if due care be observed by the passenger. In the latter case the carrier would be held responsible for the want of ordinary care only. Such was the case of *Kelly v. Manhattan R. Co.* (112 N. Y. 443) and some other cases cited by the defendant's counsel. But in the present case it appears that danger of possible injury was apprehended

Opinion of the Court, per BRADLEY, J.

by those charged with the responsibility of the management of the vessel; and that there was cause for the apprehension of serious injury to passengers exposed to the danger, in the event that the hawser or its restraining appliances should yield and give way to the force applied to accomplish the purpose in view, was demonstrated by the result. The exception to such refusal to charge was not well taken.

It was not error to submit to the jury the question whether it was carelessness on the part of the defendant in placing the toggle in such position that it fell out or through the loop into the water, if they found that it was so placed. The view of the court evidently was, as appears by the charge, that the toggle was broken by the strain upon it, but there was some evidence from which it might be inferred that it was put perpendicularly into the loop, while the weight of evidence was that it was inserted horizontally. The portion of the charge excepted to had relation to the evidence that it was perpendicularly placed into the strap, and in that view the circumstances were such as to permit the submission to the jury of the question that was submitted to them in that respect. Immediately after the toggle gave way one of the capstan bars was effectually used to supply its place and the ship warped around to the dock. The defendant's exception was to the evidence that the bar was made use of for a toggle. Those bars were near the bow capstan on the deck, they were ash timber and apparently, and in fact, of adequate strength for the toggle. The use of the bar was in the transaction of bringing the vessel to the dock continued. Its use proved that this might be accomplished in that manner by existing adequate means. This did not come within the rule which excludes evidence of subsequent change of conditions to obviate what might be regarded as a recurrence of that which may have happened on a prior occasion. It was an efficient supply of the demand required at the time to accomplish that which was then in progress. And the reception of the evidence was not error.

The other exceptions to which attention has been called by the learned counsel for the defendant, have been carefully

Statement of case.

considered and none of them seem to point to error in the rulings of the court.

The judgment should be affirmed.

All concur, except POTTER, J., not sitting.

Judgment affirmed.

In the Matter of the Application of GEORGE N. LADUE et al.
for Leave to Sell Real Estate.

118	213
128	257
118	213
137	322

Where an owner of a tract of land conveys a portion thereof by deed which bounds the land conveyed, by a street described as laid out upon a map, and provides that it shall actually be laid out of a given width within a given time, the presumption is, the conveyance carries the fee to the center of the street.

As between grantor and grantee a street is created where land clearly defined as to extent and location is devoted to that end by the grant, although it is not then in condition to be used as a street.

In such case it may with propriety be referred to in the deed as an intended street; the reference being to physical condition, not to title.

In 1795, one S., being the owner of a large tract of land situate in the city of New York, executed a deed of a small portion thereof lying in the center of the tract. The land conveyed was described as beginning at the northermost corner of a meadow belonging to S., which was part of the land conveyed, and as bounded on one side by land of S., "intended for a road of two rods in width," as would appear by a "survey or map" stated to have been made. The deed contained a covenant on the part of the grantor "that the road of two rods wide, as aforesaid, to run along and adjoin the southerly and westerly sides of the premises * * * according to the aforesaid survey or map shall be laid out accordingly and run from the Bloomingdale road within one year from the date hereof, and ever kept open from that time." There was no way of approach to the premises conveyed except by the road provided for. The grantor subsequently conveyed the lands opposite bounding them by said road. The lane or road was used as such until 1846; it was abandoned as a street in 1868 pursuant to the act of 1867. (Chap. 697, Laws of 1867.) There had never been any adverse claim or possession on the part of S. or his successors in interest, and during that time onwards, under the power of eminent domain, had been made to persons claiming title to the road through the deed in question. In proceedings to compel a purchaser to take title under a contract, to convey to him to the center of the road, *held*, that said deed gave title to the center; and that the vendor, who showed title thereunder, was entitled to the relief sought.

Mott v. Mott (68 N. Y. 246), distinguished.

In re Ladue (22 J. & S. 528), reversed.

(Argued November 26, 1889; decided January 14, 1890.)

Statement of case.

APPEAL from order of the General Term of the Superior Court of the city of New York, made March 14, 1887, which affirmed an order of the Special Term, denying a motion to compel Emerson Coleman a purchaser, to complete his contract for the purchase of certain real estate.

Prior to 1795 one Samuel Stillwell owned a tract of land in the city of New York that is now substantially encompassed by Eighth and Eleventh avenues and Eighty-fourth and Eighty-ninth streets in said city. On the 13th of September, 1886, Charles Dickinson, as the special guardian of Pomeroy and Norton Ladue, infants, entered into a contract in the usual form with Emerson Coleman for the sale of two undivided eightieths of a small portion of said tract and thereby agreed in substance to convey to such purchaser the fee simple of said interest, upon payment of the consideration named. The contract was duly approved by the court and no question was raised as to its form or substance, but when the time for performance arrived Mr. Coleman notified the special guardian that he declined to complete the purchase because a good title could not be conveyed to that part of the premises formerly used as an old lane, known as Stillwell's road. A motion to compel performance was thereupon made in behalf of the special guardian based upon an affidavit setting forth a history of the title and a copy of the maps, records and deeds deemed material, and, among others, a deed from said Stillwell and wife, to Samuel S. Bowne, dated December 31, 1795. In opposition to the motion, an affidavit was read in behalf of Mr. Coleman, who, without denying any material fact alleged in the moving papers, stated that he was ready and willing to complete the purchase provided a good and sufficient title could be given him; that an old road known as Stilwell's lane or road, formerly ran through the premises in question; that the title to the land in such road was not good or marketable, because the roadbed was never conveyed to anyone by said Stilwell, who at the time of his conveyance to Bowne, owned other lands adjoining said road, and also adjoining the land conveyed by said deed; that he also owned

Statement of case.

a large quantity of land, not adjoining the road, but so situated that it had no access to any highway except over said road; that in his conveyances to other purchasers, he did not give, by express words, any right of way, either over the road in question or over another road that he had laid out connecting therewith, called Spring street; that there remained to Stilwell, after he had given the deeds mentioned in the moving papers, no means of access to his other lands except the Stilwell road, and that his grantees had no way to their respective lands other than that road; that a calculation of the size of the tracts conveyed by the various deeds from Stilwell, shows that the land in the roads is not included in the area of the tracts as mentioned in the descriptions and that the part of the premises in question included in the old road was never enclosed until within the last few years. It appeared that said lane was used, "as a public road from 1822 to 1846," but that it was abandoned as a street in 1868, pursuant to chapter 697, Laws 1867.

Further facts appear in the opinion.

William Pierpont Williams for appellant. The deed from Samuel Stillwell to Samuel S. Bowne carried title to the center of Stillwell road. (*Mott v. Mott*, 68 N. Y. 253; *K. C. F. Ins. Co. v. Stevens*, 87 id. 291; *Bissell v. N. Y. C. R. R. Co.*, 23 id. 61; *Pollack v. Morris*, 19 J. & S. 112; *Greer v. N. Y. C. & H. R. R. Co.*, 37 Hun, 346; *Bliss v. Johnson*, 73 N. Y. 529; *Miner v. Mayor, etc.* 5 J. & S. 171; *Story v. E. I. R. R. Co.*, 90 N. Y. 145; *A. D. Co. v. Learitt*, 54 id. 35; *Jones v. Cournan*, 2 Sandf. 234; *Livingstone v. Ten Broeck*, 16 Johns. 14; Phillips on Evidence [4th Am. ed.], 802; *French v. Carhart*, 1 N. Y. 96; *Putzel v. Van Brunt*, 8 J. & S. 501.) There is now no right of way over Stillwell road which can be urged as an encumbrance upon the title. (Laws 1867, chap. 697.)

Edmund Coffin, Jr., for respondent. The deeds of Stillwell to Bowne and Woolsey did not convey any estate in the land in the Stillwell road, but only an easement to use this

Statement of case.

land as a road. (*Hussner v. B. C. R. R. Co.*, 96 N. Y. 18; *Hall v. W. W. P. Co.*, 24 N. Y. Wkly Dig. 494; *Bookman v. Kurzman*, 94 N. Y. 272; *Mott v. Mott*, 68 id. 246; *Perrin v. N. Y. C. R. R. Co.*, 36 id. 120; *Baldwin v. City of Buffalo*, 35 id. 375; *Cady v. Conger*, 19 id. 256; *Bissell v. N. Y. C. R. R. Co.*, 23 id. 61; *Perrin v. N. Y. C. R. R. Co.*, 36 id. 120; *People v. Colgate*, 67 id. 512; *White's Bank v. Nichols*, 64 id. 65; *English v. Brennar*, 60 id. 609; *Mott v. Mott*, 68 id. 246; *K. C. F. Ins. Co. v. Stevens*, 87 id. 287; *Story v. N. Y. El. R. R.*, 90 id. 122, 161, 162, 180-183; *Hussner v. B. C. R. R. Co.*, 96 id. 18; *People ex rel. v. Jones*, 112 id. 597.) The act of 1867, so far as it is relied upon to give title to this roadbed in the proposed grantors, is unconstitutional and void. (*N. F. S. B. Co. v. Bachman*, 66 N. Y. 261; *Newman v. Nellis*, 97 id. 285; *People v. Kerr*, 27 id. 188; *Cady v. Conger*, 19 id. 256; *Valentine's Laws*, 1176; *Rexford v. Knight*, 11 N. Y. 308; *B. P. Com'r v. Armstrong*, 45 id. 234; *Heath v. Barmore*, 50 id. 302; *Heard v. City of Brooklyn*, 60 id. 242; *Cooley on Const. Lim.* 556, 559; *Fearing v. Irwin*, 55 N. Y. 486; *King v. Mayor, etc.*, 102 id. 171; *In re John & Cherry Streets*, 19 Wend. 659; *People ex rel. v. Asten*, 49 How. Pr. 405; 62 N. Y. 623; *In re Barclay*, 91 id. 430; *Williams v. N. Y. C. R. R. Co.*, 16 id. 97; *People v. Kerr*, 27 id. 188; *Kelsey v. King*, 1 Trans. App. 133; *People v. Law*, 34 Barb. 494; *Story v. N. Y. El. R. R. Co.*, 90 N. Y. 122; *Van Amringe v. Barnett*, 8 Bosw. 357; *Mott v. Mayor, etc.*, 2 Hilt. 358; *Embury v. Connor*, 3 N. Y. 511; *Uline v. N. Y. C. & H. R. R. Co.*, 101 N. Y. 98; *Lahr v. M. E. R. R. Co.*, 104 id. 268; 1 Van Schaick's Laws, 303.)

George Hoadly for other parties in interest. Stillwell road was a public road of the city of New York until vacated by law. (*Bissell v. N. Y. C. R. R. Co.*, 23 N. Y. 61; *People v. Lochfelm*, 102 id. 1; *Driggs v. Phillips*, 103 id. 77; Gerard on Titles to Real Estate, 736.) The deed of Samuel Stillwell to William W. Woolsey conveyed title to the south

Opinion of the Court, per VANN, J.

half of Stillwell road. (*Bissell v. N. Y. C. R. R. Co.*, 23 N. Y. 63; *White's Bank v. Nichols*, 64 id. 70; *Mott v. Mott*, 68 id. 252; *K. C. F. Ins. Co. v. Stevens*, 87 id. 293.)

VANN, J. It is conceded that the respondent was not bound to fulfill unless at the time fixed for the completion of the contract a good and sufficient deed, conveying to him the fee simple of the interest contracted for, should be delivered or tendered. No question is raised as to the method of procedure, or as to a formal tender, and the objections to the title are confined to that part of the premises agreed to be conveyed over which the old Stilwell road formerly passed. The main point of contention is whether the deed from Stilwell to Bowne conveyed the northerly half of that road, or only an easement or right of way over it. The following are the material portions of that deed, commencing with the description of the premises conveyed, viz.: "All these certain pieces of meadow, cleared, upland, and woodland, situate, lying and being in Bloomingdale in the County and State of New York * * * bounded as follows, viz.: Beginning at the northermost corner of the meadow belonging to Samuel Stilwell * * * and running thence south * * * five chains and ten links along the land of the said Stilwell intended for a road of two rods in width." The description then continues, embracing many courses and distances, and closes with the words "to the place of beginning, according to a survey of the same by Cassimer Th. Guerck, city surveyor, bearing date the fifth day of December one thousand seven hundred and ninety-five; containing" a specified quantity of land, "bounded on the south on the land of said Stilwell intended for a road of two rods in width; on the east on the lands of said Stilwell and northerly on the lands of said Stilwell and Robert L. Bowne as will appear by the aforesaid survey or map." After the habendum clause was the following covenant: "And the said Samuel Stilwell doth hereby, for himself, his heirs, executors, administrators and assigns, covenant, promise and grant unto the said Samuel S. Bowne, his heirs, executors, administrators and

Opinion of the Court, per VANN, J.

assigns * * * that the road of two rods wide, as aforesaid, to run along and adjoin the southerly and westerly sides of the premises hereinbefore granted to Samuel S. Bowne, according to the aforesaid survey or map, shall be laid out accordingly and run from Bloomingdale road within one year from the date hereof and ever kept open from that time." There was also a covenant to warrant and defend in the usual form. The premises thus conveyed were but a small part of the Stilwell farm, taken from the center thereof, with no way of approach thereto except the road provided for in the deed. There is no evidence before us that there was any survey or map of the entire tract in existence at the date of said deed, for it will be observed that reference is made, in the description, simply to "a survey of the same," meaning the land conveyed, and in a subsequent part of the instrument to "the aforesaid survey or map," referring back to the one mentioned in the description. In a later deed, dated July 10, 1799, whereby Stilwell conveyed premises south of the road and opposite those transferred by the conveyance now under consideration, allusion is made to "a survey and map of the farm of Samuel Stilwell" made by the city surveyor "in the year seventeen hundred ninety-six." What is supposed to be a copy of that map was produced upon the motion, showing on its face that it was "surveyed January, 1796, by Cassimer Th. Guerck for Samuel Stilwell," and also showing the lane in question, extending from the Bloomingdale road to Spring street. The map alluded to in the Bowne deed, however, was not produced, but we think that the road was laid down upon it, because Stilwell in his deed to Bowne covenants to lay out "*the road*" not "a road," "according to the aforesaid survey or map," along the southerly or westerly sides of the premises conveyed. The words, "the road," as used, imply an existing road, as laid out either upon the land, or on the map, and the expression "according to the aforesaid survey or map" refer to "the road," which was the object of the covenant, and not to "the premises hereinbefore granted," which are referred to simply for the purpose of describing the road. Whether the maps

Opinion of the Court, per VANN, J.

are identical or not, therefore, the result is a conveyance according to a map, upon which the land granted was represented as abutting upon a street, with a covenant that the street should be laid out within one year and ever kept open from that time. The question now arises, what is the extent of such a grant? Does it go to the margin or to the center of the road as laid down upon the map? This depends upon the intention of the parties as gathered from the terms of the deed, the situation of the land and, where there is doubt as to the intent, from the practical construction of the grantor and grantee and their successors in title. (*French v. Carhart*, 1 N. Y. 96; *Putzel v. Van Brunt*, 8 J. & S. 501; *Livingston v. Ten Broeck*, 16 John. 14; Cowen & Hill's Notes to Phillips on Evidence, No. 526, p. 802.)

The construction, in case of ambiguity, should be most favorable to the grantee. (*Jackson v. Hudson*, 3 John. 375; *Jackson v. Blodgett*, 16 id. 172; *Gifford v. First Pres. Soc.* 56 Barb. 114.) The presumption is that a conveyance of land bounded by an existing street carries the fee to the center, because a narrow strip, such as half of a street, is much more valuable to the grantee than to the grantor and the parties are supposed to have so dealt with the property as to bring out its greatest value. (*Bissell v. N. Y. C. R. R. Co.* 23 N. Y. 61; *Wager v. T. U. R. Co.* 25 id. 526; *Perrin v. N. Y. C. R. R. Co.* 36 id. 120; *Wallace v. Fee*, 50 id. 694; *Mott v. Mott*, 68 id. 246; *Kings Co. Fire Ins. Co. v. Stevens*, 87 id. 287; *Sterry v. N. Y. El. R. R. Co.* 90 id. 122, 161.)

What is the presumption when the deed treats the street as existing upon a map according to which the conveyance is made and provides that it shall be laid out of a given width within a given time? Would not the reason of the rule extend the presumption to that state of affairs also? Under such circumstances, as between grantor and grantee, for the purpose of ascertaining the extent of the grant, should not the street be regarded as practically in existence at the date of the deed? Does not such a conveyance, of itself, make a street, so far as the parties thereto are concerned, by appropriating the land

to that purpose? Even if one part of the instrument refers to such land as "intended for a road," or street, should not that expression, as well as the covenant to lay out, when construed in connection with a map upon which the street appears as actually laid out, be held to refer to the development of the street for practical use by the removal of fences and obstructions? As between grantor and grantee a street is created when land, clearly defined as to extent and location, is devoted to that end by the grant, whether it is then in a condition to use as a street or not, although it would only be a street on paper until actually opened. Under such circumstances the parties might, with propriety, refer to it in the grant as an intended street, because not actually worked and used. Thus the reference would be to physical conditions, not to title. This view is confirmed by the fact that the grantor was to have one year within which to lay out the road, as he would need time to remove trees, fences, etc., but not to pass title, or dedicate a street.

In *Bissell v. N. Y. C. R. R. Co.* (*supra*) the owner of one-half of a city block conveyed parcels thereof to several purchasers, by lot numbers, "reference being had to the allotment and survey made by Elisha Johnson." This survey showed the lots as fronting upon a street, which, however, was merely projected and was never accepted by the public, and was not named in the deeds. The dimensions of the lots, in some instances, were so stated as to exclude the street. It was held that as between the owner and his grantees the proposed street was in fact a street, which they had the right to use as such the moment the conveyances were made, although as to the public generally it could not become a street until accepted by official act or common user. "As between them and him," the court said, "his conveyances, *per se*, dedicated it to their use as a street" and that as to them he could not be allowed to say it was not a street. It was further held that the title passed by the several conveyances to the center of the street. Thus the deeds operated not only to create the street, but also, through the presumption

Opinion of the Court, per VANN, J.

arising from the fact that it was a street, to extend the grant to the center thereof. This result did not depend upon express language, but upon the presumed intent of the grantor. A like result must follow the deed under consideration, unless the usual presumption is clearly rebutted by the language used therein.

The expression, near the close of the description, "bounded on the south by the land of said Stilwell intended for a road," when considered with the expression at the commencement of the description, "beginning at the northernmost corner of the meadow belonging to Samuel Stilwell," shows that the grantor alluded to all the land as his for the purposes of description until the conveyance should take effect. As he did not intend to reserve the "meadow belonging to Samuel Stilwell," which was a part of the property conveyed, can it be said that he intended a reservation by the expression first named? Did he not in both cases treat the land as his own for convenience of description merely?

Much importance was attached in the opinion below to the covenant to lay out within a year, which was regarded as unnecessary if the title passed to the center of the street. It will be noticed in this connection that in no part of the deed was any right given, in terms, to use the road. Still the grantee would have been partially protected, because he purchased on the faith of the map showing the road, but what would be the result if the map were lost? Something in the nature of the covenant was therefore necessary as permanent evidence of his rights. Moreover, as the map did not specify the width of the road and the deed only regulated its width as it passed by the premises conveyed, the covenant was necessary to secure a road of the desired width from those premises to the Bloomingdale road. The reservation by the grantor of a given time within which to lay out the road, as well as the agreement that it should be forever kept open, also explain the necessity of the covenant, which should not be so construed as to cut down the extent of the grant unless the language used clearly requires it.

Opinion of the Court, per VANN, J.

The case of *Mott v. Mott* (*supra*), is relied upon by both parties to this appeal. That case involved the question whether several conveyances carried the title to the center of a certain private lane. The deeds were according to a map, which, however, was not furnished to the court. The description ran to the side of the lane and thence along the same, which was held to mean along the side of the lane. The lane was not necessary to the convenient occupation of the land granted, which fronted upon a public highway. The grantors still owned land to which the lane was convenient if not necessary as a means of access. "There was a reason, therefore," as was said by the court, "why the grantors might desire to reserve the lane, while the grantees had no perceptible interest in keeping it up as a lane or passageway." The privilege of using the lane "from time to time and at all times forever hereafter with servants, laborers, horses, etc.," was expressly granted upon the condition, however, that the grantee was to pay his part of the expense of keeping it in repair. It was held that the express grant of an easement in the lane, in the light of the surrounding circumstances, showed an intent to limit the fee granted to the land outside of the lane. Referring to the grant of a right to use the lane the court said: "Standing as it does in juxtaposition with the description of the land and following it, and purporting to describe a separate and distinct right granted, to the passing of which the clause was thought necessary, it is part of the description of the whole premises and all the rights granted, and avows the intent to be in accordance with the words of the grant, viz.: to grant the land described and an easement in lands outside of the actual boundaries."

We think *Mott v. Mott*, far from being in conflict with *Bissell v. N. Y. C. R. Co.*, or with the views herein expressed, is an authority in line therewith, applying the same principles to a different state of facts. This appeal presents a case with three important facts, which together must control the decision: (1) A conveyance by a map showing the street; (2) non-accessibility to the land conveyed except over such street; (3)

Opinion of the Court, per VANN, J.

an omission to convey an easement in the street. The *Mott case* had only the first of these features, for, while the conveyance in that case was by map, there was access to the premises by a public highway, independent of the private lane, and the grant in express terms of a right of way over the latter. Ordinarily, the grant of an easement implies a reservation of the fee and where no privilege of user is given, it indicates that none was deemed necessary by the parties.

We do not think that the presumption arising from the three facts mentioned above is rebutted by the language of the deed and hence that the title passed to the center of the street. These views are confirmed by the subsequent history of the road, including the conveyance of the premises opposite those in question from Stilwell to Woolsey in July, 1799, where the course is to Stilwell's road and thence along said road according to the Guereck map. It is improbable that if the grantor had intended to reserve the northerly half of the road he would not have reserved the southerly half also. The record shows that there never has been any adverse claim or possession on the part of Stilwell, or his successors, or anyone else, in or to any part of said premises and that since 1846 the lane has not been used or claimed by anyone as a road. For upwards of ninety years, therefore, there has been an entire abandonment by Stilwell and his representatives of any claim to the roadbed, although during that time awards under the power of eminent domain have been made to persons claiming title to the road through the deed in question and others.

This case illustrates the importance of the presumption upon which our decision rests. In an early day when land was cheap Stilwell conveyed part of a farm that is now in a crowded city and of great value. To hold that he intended to reserve the fee of a street with reference to which, as laid down on a map, he conveyed the property adjoining, would be in conflict not only with his probable intention, but with public policy as well. His probable intention may be inferred, when a broad view is taken of the subject, from the utter neglect of himself and his heirs for nearly a century to claim any interest in the

Statement of case.

street. The public interest may be appreciated when it is known that all improvements must be postponed and the general welfare thus retarded unless the presumption is extended to a state of facts fairly coming within the reason upon which it is founded.

The order appealed from should be reversed, with costs, and the purchaser directed to complete his contract.

All concur.

Order reversed.

RILEY READ, Appellant v. MOSES H. NICHOLS et al.,
Respondents.

In an action to recover damages occasioned by a fire, alleged to have been caused by the negligence of defendants, which destroyed two buildings owned by plaintiff, evidence offered by plaintiff for the purpose of proving the amount of damages by the destruction of one of them, was excluded on the ground that, as to that building, defendants alleged negligence was not the proximate cause of such burning. A general verdict was rendered for the defendants. *Held*, that as the verdict exculpated defendants entirely from the charge of negligence the rejection of evidence as to the amount of damages, even if erroneous, could not have prejudiced plaintiff, and so, was not a ground for reversal.

It appeared from the evidence that a strong wind carried sparks from a smoke-stack belonging to defendants past the buildings in question to the roof of a building 280 feet distant from the smoke-stack, setting it on fire; the village in which the buildings were located had no fire apparatus, and there were no means of reaching the fire; after the building commenced to burn, the wind died down and changed its course; the fire communicated to another building north and thence across a street to a barn of plaintiff, then a building north of the one first set on fire was burned, and from it the fire spread to and destroyed the building as to which the testimony was excluded. *Held*, that the ruling of the court was proper; that the alleged negligent act was not the proximate cause of the loss.

Webb v. R. W. & O. R. R. Co. (49 N. Y. 420); *Pollett v. Long*, (56 id. 200); *Lowery v. M. R. Co.* (99 id. 158), distinguished.

At the close of the evidence, plaintiff's counsel presented to the court thirteen separate requests to charge. Some were charged as requested, some in a modified form and others refused. At the close of the charge plaintiff's counsel stated that he excepted, "to the refusals to charge as requested by plaintiff's counsel in so far as the court did refuse and to each of the refusals to charge as requested." *Held*, that this exception was not sufficiently definite and specific to present a question for review.

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Statement of case.

Five written propositions were submitted by the court to the jury with instructions that each should be answered as they determined the fact to be. Plaintiff's counsel excepted to such submission. Upon the coming in of the jury the foreman stated that they had agreed upon a general verdict; the counsel for both parties thereupon consented and the court announced that the special questions were withdrawn from the jury and then a general verdict in favor of the defendants was rendered. The first question, as it appeared in the case, had the word "yes" written under it. Plaintiff insisted that the proposition answered in the affirmative should be regarded and treated as a fact found by the jury. *Held*, untenable; and that the consent to the withdrawal of the questions constituted a waiver of the exception to their submission.

(Argued December 4, 1889; decided January 14, 1890.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon order made April 20, 1886, which affirmed a judgment in favor of defendants entered upon the verdict.

This action was brought to recover damages for the destruction of two buildings of plaintiffs by fire, alleged to have been caused by the negligence of defendants.

The facts are sufficiently stated in the opinion.

A. Taylor for appellant. It was error on the part of the court below to grant the non-suit as to the defendant, Moses H. Nichols. (Addison on Torts, §§ 283, 1321; 2 Wait's Law and Practice, 285; 8 Barb. 355; 21 id. 589.) The court below erred in excluding the testimony offered by the plaintiff to prove the damages which he sustained by the destruction of the buildings which were situated on Main street. (94 U. S. 469; 80 Penn. St. 373; 26 Wis. 224; 49 Ill. 349; 98 Mass. 414; 107 id. 494; 19 Johns. 381; 4 Denio, 464; 6 N. Y. 397; 49 id. 420; 55 id. 108; 56 id. 200; 86 id. 408; 99 id. 158, 166.) The court erred in charging the jury that "only the damages of the first sufferer are what are called proximate damages." (2 Sedg. on Dam., 362; 5 Otto, 117; 67 Mo. 715; *Sauter v. N. Y. C. & H. R. R. Co.*, 66 N. Y. 50; 4 Otto, 469; 1 Bouvier, 247; 4 Gray, 412.) The hub factory

Statement of case.

of the defendants as operated on the 29th day of May, 1882, by reason of the fuel used and the manner of generating steam, apart from the burning out or pounding of the smoke-stack, was a public nuisance. (Code Civ. Pro., § 1660; 1 Sedg. on Dam., 209; 13 Barb. 290; 1 N. Y. 167; 108 Mass. 261; 18 Minn. 324; *C. B. Co. v. Lewis*, 63 Barb. 111; 51 N. Y. 476; Addison on Torts, § 283.) It was a grave error for the court below to require the jury to answer specific questions. (Code Civil Pro., § 1167; 61 N. Y. 79; *Ryan v. N. Y. C. R. R. Co.*, 56 id. 200; *Vandenburgh v. Truax*, 4 Denio, 464; *Webb v. R., W. & O. R. R. Co.*, 49 N. Y. 420; 56 id. 200; 99 id. 166.)

W. J. Welch for respondent. The defendant, Moses H. Nichols, had no interest in or control over the hub factory, or in the business carried on there. There was no evidence of any such interest, and the order of the court dismissing the complaint as to him was not error. (*Mitchell v. Roulstone*, 2 Hall, 379; Abb. Tr. Evi., 207, subd. 11; Abb. Tr. Brief, 117, 124; *Neuendorff v. W. M. L. Ins. Co.*, 69 N. Y. 392; *Bauler v. N. Y. & H. R. R. Co.*, 59 N. Y. 356, 366; *Dwight v. Germania Insurance Co.*, 103 id. 359.) As to the defendant, Edwin H. Beers, the finding of the jury upon sufficient proof is conclusive as to every state of facts under which any liability could, by any possibility, attach to him. (1 Addison on Torts, 197, 198; *Mayor, etc., v. Cunliff*, 2 N. Y. 174, 175; *Blunt v. Aiken*, 15 Wend. 522; *Hause v. Cowing*, 1 Lans. 288; *Loose v. Clutes*, 51 N. Y. 494.) The defendant, William H. Nichols is not liable for the damage arising from the spread of the fire from the first building burned. (*Ryan v. N. Y. C. R. R. Co.*, 35 N. Y. 210; *Hoag v. L. S. & M. S. R. Co.*, 85 Penn. 293; *Kerr v. P. R. R. Co.*, 62 id. 353; 71 Ill. 572; *Reiper v. Nichols*, 31 Hun, 491; *P. Co. v. Whitlock*, 99 Ind. 16; 50 Am. Rep. 71; *Reiper Case*, 31 Hun, 491; *Judd v. Cushing*, 51 id. 187.) Counsel by consenting to withdrawal of questions waived his exception. (61 N. Y. 79.)

Opinion of the Court, per PARKER, J.

PARKER, J. The court submitted to the jury five written propositions, with instructions that each be answered as they should determine the fact to be.

Plaintiff's counsel excepted to such submission. It is unnecessary to determine whether the question sought to be presented by the exception merits consideration, for it was subsequently waived. The consent of counsel for both plaintiff and defendants that the written questions be withdrawn, upon which consent the court withdrew them, constituted a waiver of the exception taken to their submission.

The first of the five propositions submitted appears to have had the word "yes" written underneath it, while the others do not purport to have been passed upon in any way. The plaintiff in this court insists that it should be regarded and treated as a fact found by the jury. This cannot be done, for it is not before us in such a way as to render it effectual for such purpose. The jury stated to the court through their foreman that they had agreed upon a general verdict. Thereupon the court suggested the withdrawal of the special questions. Both counsel consented. The court announced that the special questions were withdrawn from the jury, and then a general verdict in favor of the defendants was rendered. The special questions having been withdrawn from the jury, by consent, before the general verdict was rendered, it is apparent that no basis exists upon which to predicate a holding that the special questions constituted a part of the finding and verdict of the jury.

The jury rendered a verdict in favor of the defendants, and the General Term having affirmed, we have but to consider the exceptions taken by the plaintiff.

Our attention is directed by the appellant to but three exceptions aside from those already considered.

The first relates to the granting of a non-suit as to the defendant Moses H. Nichols. The General Term held that the evidence was not sufficient to warrant a verdict against him. Such holding is in accord with our view, after carefully considering the evidence adduced, for the purpose of charging him with liability

The second was in reference to the exclusion of testimony offered by the plaintiff for the purpose of proving the amount of damages sustained by the destruction of the buildings situated on Main street.

The evidence was excluded upon the ground that defendants alleged negligence was not the proximate cause of such burning. In view of the verdict of the jury in favor of the defendants upon the issue submitted, and involving the liability of defendants to the plaintiff for the negligent burning of other buildings on the same occasion, it is not apparent how the rejection of such evidence can be deemed to have resulted prejudicially to the plaintiff.

The plaintiff sought to prove all the damage done to his real estate.

The court excluded some evidence, because considered too remote, and the jury having found in favor of the defendants, it is not conceivable that the exclusion of certain elements of damage to plaintiff's real estate could have affected the result. If, then, it be conceded that the learned court erred in his ruling in that regard, the error is not of such a character as to justify a reversal of the judgment. But we are of the opinion that the ruling of the court was abundantly supported by authority.

May 29th, 1882, a strong wind from the northwest carried sparks from a smoke-stack belonging to the defendants to the roof of an old three-story wooden building, the property of one E. D. Read, a distance of 280 feet south twenty-two and one-half degrees east, from the smoke-stack. The sparks were carried across Main street, and nearly diagonally across Read street at its junction with Main, and past, but not over, the buildings in question to the E. D. Read house. The fire on the roof was seen as soon as it commenced to burn, but the village of Hancock in which these buildings were located, did not possess any fire apparatus, and there were no ladders in the vicinity of sufficient length to enable the persons present to either go upon the roof or throw water upon it. From the E. D. Read building, the fire communicated to the blacksmith's

Opinion of the Court, per PARKER, J.

shop on the north; thence in a westerly direction across Read street to the barn of the plaintiff, which was destroyed. The next building to burn, situated northerly from the Read house, was Mallory's saloon. From that building, the fire spread to and destroyed the building in question. After the E. D. Read house commenced to burn, and before either of the buildings of plaintiff on Main street took fire, the wind died down and changed to a slight breeze from the south. Unless then, a party can be held liable for all buildings which may be burned, so long as the first cause can be traced to his negligent act in setting fire to his own or a neighbor's building without reference to a change of wind, absence of fire apparatus or other intervening and contributing causes, then the court did not err in holding that the burning of such of plaintiff's buildings as were situated on Main street, was not the proximate result of the alleged negligent act of the defendants in permitting sparks to escape so as to set on fire the E. D. Read house.

Certainly the facts here presented are much more favorable to the defendants than they were in *Ryan v. N. Y. C. R. R. Co.*, (35 N. Y. 210).

That case has been distinguished by this court in *Webb v. B. W. & C. R. R. Co.* (49 N. Y. 420); *Pollett v. Long* (56 id. 200); and *Lowery v. Manhattan Railway Co.* (99 id. 158). But it has never been overruled, and the rule still obtains in this state that when the facts are undisputed the court may, under some circumstances, determine as a matter of law whether the act complained of is the immediate or remote cause of the injury.

In the *Webb case* the property of the plaintiff destroyed was contiguous to that of the defendant, and the evidence tended to show that from the place where the live coals dropped to the lands of the plaintiff there was an accumulation of combustible matter, and that it was a time of drouth.

Judge FOLGER, in delivering the opinion of the court, said: "Nor am I able to confine the act of negligence to the dropping of the coal from the engine, and thus separating it from all the other concurring acts and omissions of the defend-

Opinion of the Court, per PARKER, J.

ants, make that the solitary prime cause of a series of causes."

In *Pollett v. Long* (*supra*), defendant's dam was defective and in consequence gave way. The volume of water thus suddenly precipitated upon a dam below tore it out, and a little further down the stream a third dam was washed away. In an action to recover for damages sustained by the tearing out of the third dam, the trial court charged the jury that if there was sufficient water in the middle pond to materially increase the volume and force of the stream, then plaintiff could not recover for injuries to the lower dam, as the damages would be too remote. This was held error. Judge GROVER, after discussing the *Ryan case*, said: "Assuming this rule was correctly applied in the case of *Ryan v. New York Central*, * * * it comes far short of sustaining the proposition under consideration."

In *Lowery v. Manhattan Railway Company* (*supra*), a coal of fire dropped from an engine of the defendant upon the back of a horse causing him to run away. The driver attempted to rein him against the curb-stone for the purpose of arresting his progress. The wagon passed over the curb-stone and thence over the plaintiff injuring him. A recovery by the plaintiff was sustained. Judge MILLER, in his opinion, said, "that the *Ryan case* is clearly distinguishable from the case at bar."

If it may be said that the rule laid down in the *Ryan case* has been broadened somewhat by the decisions referred to, it cannot be contended that it has been so far modified as to permit a holding that the burning of the Main street buildings was the ordinary and natural result of the act complained of. If it could be so held then however many buildings might be burned if the fire but spread from one building to another, the negligent party would be liable to respond in damages to every owner. Even if as in this case the course of the wind had so changed as to drive the flames and sparks of burning buildings in a direction other than was possible at the moment of the performance of the wrongful act. We think the court did not err in holding that the damages sustained by the burning

Statement of case.

of the Main street buildings were not the proximate, but the remote result of the acts complained of.

The third relates to the disposition of the plaintiff's request to find and especially to the qualified manner in which the court charged the thirteenth request. At the close of the evidence the counsel for the plaintiff presented to the court thirteen separate requests to charge. Some were charged as requested, some were charged in a modified form, and others refused. At the close of the charge counsel stated that he excepted "to the refusal to charge as requested by plaintiff's counsel in so far as the court did refuse, and to each of the refusals to charge as requested."

An exception thus taken is not sufficiently definite and specific to present a question for review (*Smedis v. Brooklyn and Rockaway Beach R. R. Co.*, 88 N. Y. 13; *Newell v. Bartlett*, 114 N. Y. 399).

The judgment should be affirmed.

All concur, except FOLLETT, Ch. J. and PORTER, J., not sitting.
Judgment affirmed.

RANDALL C. COWENHOVEN, Appellant, v. GEORGE W. BALL,
Respondent.

118	281
168	245
168	487

On appeal to this court from a judgment entered at General Term, "upon a verdict subject to the opinion of the court," the return must contain a "statement of the facts, of the questions of law arising thereupon, and of the determination of those questions by the General Term," as required by the Code of Civil Procedure (§ 1339); without such a statement the appeal may not be heard.

While in general, where exceptions have been taken on trial, it is erroneous to direct a verdict subject to the opinion of the General Term, the party taking the exceptions may waive them, and by consent the case may be submitted to the General Term, and where no exception was taken at the trial to the direction of a verdict and the objection to the power of the General Term to hear the case was not raised in that court, it will be deemed to have been waived.

It seems, objections which are in the case, arising upon the evidence and involved in the controversy between the parties, are meritorious and

Statement of case.

available to the unsuccessful party on appeal although they may not have been considered in the lower court.

Objections, however, to the proceedings not connected with the matters in issue, but which are preliminary and go only to the right and power of the court to hear the case, are technical and are deemed to have been waived if the party proceeds with the trial or argument without raising them.

A party intending to question the power of the court to hear the case should do so at his earliest opportunity, and if his objection is overruled, he should see to it that by an appropriate order the ruling is made apparent on the record.

(Argued December 10, 1889; decided January 14, 1890.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made February 9, 1886, which ordered judgment upon a verdict directed for defendant at the circuit, subject to the opinion of the General Term.

This was an action of ejectment.

The facts material to the appeal are set forth in the opinion.

E. H. Benn for appellants. If there is any conflict of evidence in a case, or if exceptions have been taken to rulings on the trial by the defeated party, it is error to direct a verdict subject to the opinion of the court at General Term and a mistrial for which the judgment will be reversed. (*Purch v. Mattison*, 25 N. Y. 211.) It is not necessary that either party should object to make the error fatal. Nothing short of an *express* consent would be a waiver. (*Byrnes v. City of Cohoes*, 5 Hun, 602; 67 N. Y. 204.) Independently of the statute of limitations the plaintiff has made out a proper case in ejectment against defendant. (*Territt v. Cowenhoven*, 11 Hun, 320; 79 N. Y. 400; *People ex rel. v. Howlett*, 76 id. 574; 3 Wait's Act. & Def., 12, 13.) The statute of limitations does not apply, if it does, it was not run for the proper period. (*Luce v. Curley*, 24 Wend. 451.)

John T. Barnard for respondents. The judgment of General Term thereon cannot be reviewed unless a statement of

Opinion of the Court, per BROWN, J.

facts and the conclusions of law is prepared and filed with the judgment roll. (*Reinmiller v. Skidmore*, 59 N. Y. 661; *Terrett v. Cowenhoven*, 79 id. 400; *Overing v. Kussell*, 32 Barb. 263; *Humbert v. Trinity Church*, 24 Wend. 689; *Sands v. Hughes*, 53 N. Y. 296; *Toole v. Remsen*, 70 id. 303; *Reformed Church v. Schwcraft*, 65 id. 134; *Cugger v. Lansing*, 64 id. 417.) Title to land which has been acquired by twenty years adverse possession is equally strong as one obtained by grant. (*Sherman v. Kane*, 86 N. Y. 57.)

BROWN, J. When the plaintiff rested his case at the trial, the court directed a verdict for the defendant subject to the opinion of the General Term.

Such a direction was proper under section 1185 of the Code, if the facts were undisputed and the case presented questions of law only. (*Howell v. Adams*, 68 N. Y. 314.)

Judgment was ordered by the General Term upon the verdict so directed and the plaintiff has appealed to this court.

The return contains the case as heard at the General Term with the judgment-roll, but no statement of facts or of the questions of law arising thereon, or the determination of the General Term upon such questions, and it nowhere appears that such a statement has been prepared or settled as required by section 1339 of the Code. Without such a statement the case cannot be heard in this court. (*Code*, § 1339; *Reinmiller v. Skidmore*, 59 N. Y. 661; *Essex Co. Bank v. Russell*, 29 id. 673.)

The appeal must therefore be dismissed, unless the appellant is correct in his claim that the judgment should be reversed on the ground that there were objections and exceptions to the rulings of the court during the trial, and the case therefore was not one in which a verdict subject to the opinion of the General Term could be directed, and that such erroneous direction of the trial court amounted to a mistrial. (*Matson v. F. B. Insurance Co.*, 73 N. Y. 310.)

The rule is well established that where a verdict is ordered subject to the opinion of the court without qualification,

Opinion of the Court, per BROWN, J.

exceptions cannot be heard. (*Durant v. Abendroth*, 69 N. Y. 148.) Hence when exceptions have been taken it is in general erroneous to direct a verdict subject to the opinion of the General Term. (*Byrnes v. City of Cohoes*, 67 N. Y. 205.

But the party taking the exceptions may waive them and the case may be submitted to the General Term by consent.

In the last case cited there was an express consent to that effect and this court held that the exceptions were thereby waived. In this case the record shows that plaintiff requested that certain facts should be submitted to the jury. He took no exception however, to the refusal of the court to submit the case to the jury, nor to the direction of a verdict.

While such an exception was probably not necessary for him to claim at the General Term that such direction was erroneous, it would seem to be a reasonable rule that he should be required to raise that question in that court if he intended to claim there was a mistrial.

It has been so held in the Supreme Court (*Briggs v. Merrill*, 58 Barb. 389; *Biddlecom v. Newton*, 13 Hun, 582), and in the Superior Court of New York, (*Porter v. Schepeler*, 2 Bosw. 188.)

In the cases cited by arguing the motion for judgment on the merits the appellant was deemed to have waived his exceptions. We think the rule a salutary one.

A waiver is a voluntary relinquishment of some right. It implies an election of the party to dispense with some advantage which he might, at his option, have demanded or insisted upon. And it is applied on the principle that when a party, whose right is to object, takes no objection to the proceedings or to the power of the court to hear the case, he is held to have waived all objections to formal and technical defects.

Not having spoken when he ought he will not be permitted to speak when he would. (*Johnston v. Oppenheim*, 55 N. Y. 291.) Numerous instances appear in the reports where a party has been held to have waived objections to the regularity of legal proceedings by failing to take the objection promptly.

A voluntary appearance in an action is deemed a waiver of

Opinion of the Court, per BROWN, J.

an objection that the summons was served outside of the territorial jurisdiction of the court, and of all defects in the process and irregularities in its service.

A party by going to trial before a referee waives his constitutional right to a trial by jury.

A public officer, prosecuted in a county other than the one in which the act was done for which he is sued, waives that objection by going to trial, and a general appearance in an appellate court is a waiver of an objection that the notice of appeal was not served in due season. These are familiar cases.

An appearance before a board of assessors and examination of the assessment-roll, without objecting that lands were illegally entered against the name of the party, and making no complaint except as to valuation, was held a waiver of the statutory requirements that the assessors should follow a certain course in subjecting lands to taxation. (*Hilton v. Fonda*, 86 N. Y. 340.)

In a recent case in this court, it was held that a judgment creditor, by appearing before a county judge in a proceeding for the discharge of a judgment debtor from imprisonment, and failing to object, waived the objection that the affidavit to the petition for the discharge of the prisoner was not made on the day of the presentation of the petition as required by section 2204 of the Code. (*Shaffer v. Risley*, 114 N. Y. 23.)

Foster v. Hepburn (48 N. Y. 41) was an action to determine claims to real property in which the defendants appeared and answered the complaint. On appeal from an order vacating the judgment on the ground that, because of a failure to comply with the provisions of the Revised Statutes, the court had not acquired jurisdiction, this court held, that assuming that the statutory provisions in relation to such actions had not been complied with, that by appearing and taking part in the proceeding, without objection, the defendants must be deemed to have waived all objections to irregularities in the proceeding which otherwise they might have made.

In civil cases a party may stipulate away all his rights, questions of jurisdiction as well as others, and he may do this by express agreement, by acts inconsistent with the objection, or

Opinion of the Court, per BROWN, J.

by his silence and omission to present the proper points when he ought to object. (*Vose v. Cockcroft*, 44 N. Y. 415.)

The distinction is clear between objections which are *in* the case and arise upon the evidence, and are involved in the controversy between the parties and those which are *to* the proceedings, and not connected with the matters in issue, but are preliminary, and go only to the rights and power of the court to hear the case.

The former are meritorious and are available to the unsuccessful party on appeal, although they may not have been considered in the lower court. The latter are technical, and do not affect the merits and are deemed to have been waived if the party proceeds with the trial or argument of his case without raising them.

If this rule is not to be applied to this case the appellant has his chance of success at the General Term and if he is beaten in that court on the merits, he is certain of reversing the judgment in this court on the ground that there was a mistrial. A rule that would permit a practice of such character should not be sanctioned.

A party if he intends to question the power of the court to hear the case should do so at the earliest opportunity, and if his objection is overruled he should see to it that, by an appropriate order, the erroneous ruling is made apparent on the record.

So far as we can ascertain from the record before us this case was heard and decided by the General Term on the facts and the objection that a verdict had been improperly directed was not raised. The judgment recites that the verdict of the defendant subject to the opinion of the General Term was brought on for argument and counsel for the respective parties were heard thereon. The objection to the power of the General Term to hear the case not having been raised in that court the objection must be deemed to have been waived, and the case on appeal to this court not having been prepared as required by section 1339 of the Code, the appeal must be dismissed with costs.

All concur.

Appeal dismissed.

Statement of case.

CATHARINE WRIGHT, Respondent, v. MUTUAL BENEFIT LIFE
ASSOCIATION OF AMERICA, Appellant.

118	287
158	29
118	287
159	416

A certificate of membership and insurance upon the life of W., payable to H., issued by defendant, contained this provision: "No question as to the validity of an application or certificate of membership shall be raised, unless such question be raised within the first two years from and after the date of such certificate of membership and during the life of the member therein named." The application upon which the certificate was issued, contained an agreement "that if any misrepresentation or fraudulent or untrue answer or statement has been made, or if any fact which should have been stated to the association be suppressed," the agreement shall be void. W. died within the two years. In an action upon the certificate, defendant alleged fraud and false statements in the application; also, that H. had no insurable interest in the life of the insured, but that the insurance was a speculative action on his part to secure an advantage to himself on the life of W. Upon the trial defendant offered evidence to sustain this defense, which was objected to as inadmissible under the said provision of the certificate and excluded. *Held*, no error, as under the provision quoted no such defense was available after the death of the insured; that the stipulation was within the power of the parties to make, and was in the nature of and served a similar purpose to the statute of limitations and repose; that it was not a stipulation absolute to waive all defenses and to condone fraud, but provided ample time and opportunity within which they may be, but beyond which they may not be set up.

Also, *held*, that plaintiff, who claimed as assignee of H., was entitled to recover the whole amount provided by the policy, although the debt owing the payee by the insured, to secure which the insurance had been made payable to H., was less than the sum insured, or had been paid in the lifetime of the latter, or although a portion of the sum provided by the policy was designed by the payee, in a contingency, for the benefit of some other person.

Reported below (43 Hun, 61).

(Argued December 10, 1889; decided January 4, 1890.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made January 11, 1887, which affirmed a judgment in favor of plaintiff entered upon a verdict directed by the court.

This action was upon a certificate of life insurance dated December 6, 1883, issued by defendant, upon the life of Charles F. Wright.

Statement of case.

The certificate was payable to Byron D. Houghton, and was for the sum of \$5,000. The assured died June 4, 1885. In December, 1885, or January, 1886, Houghton assigned his interest in the certificate to plaintiff who was the wife of the deceased. Houghton paid all dues and assessments from the first, either directly or by advancing the necessary amounts and charging them to said Charles F. Wright.

The application upon which the certificate was issued contained a condition on the part of the applicant "that if any misrepresentation or fraudulent or untrue answer or statement had been made, or if any fact which should have been stated to the association be suppressed," the agreement of assurance should be null and void. The applicant also warranted the truth of the statements in his application. Houghton stated in his proof of loss that at the time of his death, the deceased owed him \$2,823.10, and the proof in the case shows that a considerable portion of that indebtedness existed at the time of the issuance of the policy and increased until it reached the above amount. The defendant alleged in answer, that false and untrue statements were made by Wright in his application with a view to influence the action of the defendant in granting the application. Also, that Wright and Houghton both knew the falsity of the statements; that the defendant was cheated and misled thereby and that Wright and Houghton knew that if the truth in regard to the health and habits of the applicant had been stated, the application for insurance would have been denied.

Further facts are stated in the opinion.

G. H. Crawford for appellant. If the defendant had stipulated in express terms that even the willful fraud of the appellant in obtaining the certificate should not, when thereafter discovered, constitute a defense to the certificate, unless so discovered and acted upon within two years, such a stipulation would not be enforced, because contrary to the policy of the law. (*Bliss on Life Ins.*, 429, 430; *Bunyon on Life Ins.*, 85; *Collins v. Blanton*, 2 Wils. 341; *Holman v. Johnson*,

Statement of case.

Cowp. 343; *R. R. Co. v. Lockwood*, 17 Wall. 357; *Mynard v. S. R. R. Co.*, 71 N. Y. 186; Code of Pro., §§ 382, 410.) The minor son of the assured, or his trustee, is a necessary party to this action. (*Dry v. Roth*, 18 N. Y. 448; 24 Barb. 365; 8 How. Pr., 385; 11 Paige, 314-319; 71 N. Y. 502.)

Francis E. Hamilton for respondent. The court was correct in refusing to require plaintiff to elect under which count in the complaint she would proceed. The two counts were properly joined. (Code, §§ 483, 484.) Houghton had, at the inception of the policy, an insurable interest, and, therefore, as the same was not shown to have been extinguished, he had it after the death of Wright and could execute a valid assignment of the policy. (*Ferguson v. M. M. L. Ins. Co.*, 32 Hun, 306; *Rawls v. A. L. Ins. Co.*, 27 N. Y. 282; *C. M. L. Ins. Co. v. Schaefer*, 94 U. S. 457.) The proof herein shows Wright to have obtained this insurance himself, and he had an undeniable right to make it payable to Houghton, who then became vested in a right in the insurance which was, and at all times remained, assignable. (*Obinstead v. Keyes*, 85 N. Y. 593; *Carragher v. M. L. Ins. Co.*, 11 N. Y. S. R. 665; *Goodwin v. M. M. L. Ins. Co.*, 73 N. Y. 480; *Miller v. E. L. Ins. Co.*, 2 E. D. Smith, 268; *Morell v. T. L. Ins. Co.*, 10 Cush. 282; *Bevin v. C. L. Ins. Co.*, 23 Conn. 244; *Ferguson v. M. L. Ins. Co.*, 32 Hun, 312; Bliss on Life Ins., § 30; 32 Alb. L. J., 385, 403; *Rawls v. A. M. L. Ins. Co.*, 27 N. Y. 282; *Goodwin v. M. L. Ins. Co.*, 73 id. 497; *Campbell v. N. E. M. L. Ins. Co.*, 98 Mass. 381; *Lemon v. P. M. L. Ins. Co.*, 38 Conn. 294; *C. M. L. Ins. Co. v. Schaeffer*, 94 U. S. 457; *A. L. & H. Ins. Co. v. Robertshaw*, 26 Penn. St. 189.) The company defendant, by its contract of insurance, had divested itself of the right to raise any question as to the validity of the application or certificate of membership, unless raised during the life of the member insured. (Green on Ev., 277, 283; *Wilson v. Randall*, 4 N. Y. 140; *Riley v. City of Brooklyn*, 46 id. 444; *In re Com'rs of Washington Park*, 52 id. 131; 3 Parsons on Contracts, 17; *Van Nostrand v. N. Y. G. Co.*, 7

Opinion of the Court, per POTTER, J.

J. & S., 73.) The company defendant, has waived the breach of warranty in the application, if any, and is estopped from insisting upon it. (*Titus v. G. F. Ins. Co.*, 87 N. Y. 410; *Prentice v. K. L. Ins. Co.*, 77 id. 483.) The language "no question as to the validity," is in terms broad enough to exclude the defense sought to be established. (*Myers v. Dorman*, 34 Hun, 115; *Porter v. Worser*, 94 N. Y. 431; *Ormes v. Dauchy*, 82 id. 443; *Curtis v. Gokey*, 68 id. 304; *Coleman v. Black*, 97 id. 545; *Calanan v. McClure*, 47 Barb. 206; *In re Cooper*, 93 N. Y. 507; *Lee v. Tillotson*, 24 Wend. 337; Cooley on Const. Lim. 181; *Ripley v. Æ. Ins. Co.*, 30 N. Y. 136; *Mayor etc., v. H. Ins. Co.*, 39 id. 45; *Wilkinson v. F. N. F. Ins. Co.*, 72 id. 499; *Calanan v. McClure*, 47 Barb. 206; *W. C. Co. v. Hathway*, 8 Wend. 480; Brooms Leg. Maxims, 279; *Hill v. Epley*, 31 Penn. St. 331; *Titus v. Morris*, 40 Me. 348.)

POTTER, J. This is an action to recover of the defendant the amount it agreed to pay under a policy or certificate insuring the life of Charles F. Wright.

Upon the trial, after the plaintiff had introduced the necessary proofs to entitle her to a recovery, the defendant offered to prove as a defense to the action, that the deceased Charles F. Wright and Byron D. Houghton, the beneficiary named in the policy, for the purpose of obtaining the policy and defrauding the defendant, falsely represented that Wright, the insured, was not then suffering and never had been suffering from certain diseases which had seriously impaired his health, for the purpose of inducing and by means whereof defendant was induced to issue the policy insuring the life of said Wright and that such representations were false, etc.

This evidence was objected to by the plaintiff, that such proof was inadmissible under the provision of the policy; "that no question as to the validity of an application or certificate of membership shall be raised, unless such question be raised within the first two years from and after the date of such certificate of membership, and during the life of the member therein named," and the objection was sustained and defendant excepted.

Opinion of the Court, per POTTER, J.

The defendant also offered to show that the beneficiary Houghton, had no insurable interest in the life of the insured, in short, that it was a speculative and fraudulent scheme, devised and practiced by Houghton, to secure an advantage to himself upon the life of Wright which must soon terminate from the diseases he was then afflicted with. This was also objected to by the plaintiff and excluded by the court and defendant excepted, the court holding that the defendant could not show any such thing unless during the life of the assured or during the period of two years from the date of the policy such question had been raised.

These rulings present the main question upon this appeal and inasmuch as I have reached the conclusion that the judgment should be affirmed, there is but little, if any, occasion to add anything to the reasons contained in the opinion of the General Term affirming the judgment of the trial court in this case. (43 Hun, 61.) There does not seem to be room for any doubt in relation to the meaning of the stipulation referred to. The defendant's counsel does not contend that the language of the stipulation or waiver is not plain and comprehensive of everything which can constitute a defense, nor that the stipulation, though indorsed upon the certificate, does not form a part of the contract of insurance. But he argues from certain supposed analogies to stipulations releasing carriers from liability which have been held not to exempt the carrier from liability for negligence, that it must have been intended between the defendant and the insured to except the defense of fraud from the operation of the stipulation in question. (*Mynard v. S. B. & N. Y. R. R. Co.*, 71 N. Y. 180; *Holsapple v. R., W. & O. R. R. Co.*, 86 id. 275.) It does not seem to me that there is any analogy between the two classes of liability and nothing is more misleading than an assumed analogy.

The liability of a common carrier of persons or property for injury or loss was adopted at a very early period in view of the peculiar exigencies of the carrying trade, as a rule of public policy. The degree and extent of the liability of the carrier for negligence was fixed by law and not by the terms of

Opinion of the Court, per POTTER, J.

a contract between the parties. There were numerous contingencies incident to the carrying business other than the negligence of the carrier which might result in loss or injury to the person or goods carried and for which the liability of the carrier would depend upon the facts to be established upon a trial. It might well be held in construing an agreement of exemption in general terms, that its office and effect was to relieve from those grounds of liability which depended upon the evidence and not the liability which was fixed by law. The rules laid down in the cases referred to by the appellant's counsel is merely a rule of the construction of the terms and effect of an agreement.

It by no means holds that liability for negligence may not be stipulated away; for the contrary has been repeatedly held, but the terms of the stipulation in those cases did not provide exemption from liability for negligence. The case under consideration is an alleged fraud in making a private contract between the parties to it.

The contract contains a great number of material representations in relation to the past and present condition of the insured and of course they are variable with every applicant for insurance and every person insured. Such representations if untrue constitute a breach of warranty which will avoid the contract of insurance. If the representations are known by the party making them to be untrue when made, they would also constitute a fraud and avoid the contract of insurance. The difference between the representations and the proof of them upon a trial to avoid the contract would be only the fact whether the party knew the representation was false when he made it. It is to be presumed that the defendant had some purpose when it offered to the insured a contract containing the stipulation and that the stipulation itself had some meaning. The court is asked to hold that the parties to the stipulation understood (for unless the insured so understood the stipulation the defendant was practicing a *fraud upon him*); that while the stipulation embraced all representations that were untrue, it did not embrace the same representations, if known

Opinion of the Court, per POTTER, J.

by the party making them, to be untrue. The practical difference or effect of this would be, that upon a trial to enforce the contract, the proofs of the representation, their materiality and untruth, would have to be made all the same, but the stipulation would come in as a defense to all representations save those the insured knew to be false. While I might, perhaps, entertain the idea that the *insurer* so understood the stipulation, I am very confident that the *insured* did not so understand it. It seems to me the analogy is based upon an entire misconception of the object and meaning of the stipulation. It is not a stipulation absolute to waive all defenses and to condone fraud. On the contrary, it recognizes fraud and all other defenses but it provides ample time and opportunity within which they may be, but beyond which they may not be, established. It is in the nature of and serves a similar purpose as statutes of limitations and repose, the wisdom of which is apparent to all reasonable minds. It is exemplified in the statute giving a certain period after the discovery of a fraud in which to apply for redress on account of it and in the law requiring prompt application after its discovery, if one would be relieved from a contract infected with fraud. The parties to a contract may provide for a shorter limitation thereon than that fixed by law and such an agreement is in accord with the policy of statutes of that character. (*Wilkinson v. First Nat. Fire Ins. Co.*, 72 N. Y. 499, 502.)

No doubt the defendant held it out as an inducement to insurance by removing the hesitation in the minds of many prudent men against paying ill-afforded premiums for a series of years when in the end and after the payment of premiums, the death of the insured and the loss of his and the testimony of others, the claimant instead of receiving the promised insurance may be met by an expensive lawsuit to determine that the insurance which the deceased has been paying for through many years, has not and never had an existence except in name. While fraud is obnoxious and should justly vitiate all contracts, the courts should exercise care that fraud and imposition should not be successful in annulling an agreement, to the

Statement of case.

effect that if cause be not found and charged within a reasonable and specific time, establishing the invalidity of the contract of insurance, it should thereafter be treated as *valid*. Hence I fail to perceive any error in the disposition made of this question in the court below.

The right of the plaintiff, as the assignee of the payee specified in the policy, to recover the whole amount provided by the policy is well settled, even if the debt owing the payee by the person whose life was insured was less than the sum insured, or had been paid in the lifetime of the insured, or if a portion of the sum provided by the policy was designed by the payee in a contingency for the benefit of some other than the payee under the policy. (*Olmsted v. Keyes*, 85 N. Y. 593, 599.)

If there is a legitimate *cestui que trust* (of which there is serious question) the plaintiff is the trustee and their rights can be adjusted without involving or imperilling the defendant. (§ 449, C. C. P; *Hutchings v. Miner*, 46 N. Y. 456.)

I think the judgment should be affirmed with costs.

All concur; HAIGHT, J., in result; FOLLETT, Ch. J., not sitting.

Judgment affirmed.

WILLIAM F. TAYLOR, Respondent, v. ELIJAH J. MILLARD, Appellant.

In an action of trespass it appeared that J. and E. owned, as tenants in common, a farm of about one hundred and seventy acres, upon which there was an apple orchard. In 1850 they made a parol partition of said farm by which J. was to have one hundred acres, including the orchard, and E. the remaining seventy acres. As part of the oral agreement, E., his heirs and assigns, were to have the right to enter upon J.'s part and gather one-half of the apples, growing or to grow, in said orchard. Immediately thereafter the parties took possession of their respective portions, and they and their successors in title continued to occupy the parts so allotted to them respectively without any claim of title being made by either to the land so owned and occupied by the other. E. died in 1854; by his will he devised said seventy acres and the "appurtenances" to defendant, and gave to him all his "right, title and interest to the

118 244
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Statement of case.

apples, growing or to grow, on the premises now occupied by J." Said defendant took possession of the seventy acres under the will and occupied them until 1861, when he conveyed them with "appurtenances" to M., by deed which was duly recorded but which did not mention any right to enter upon the one hundred acres and gather half the apples. Plaintiff claimed the one hundred acres under a deed from J. Neither that deed, nor the one to plaintiff, contained any reference to any right of the owner of the seventy acres to enter upon the land conveyed. Shortly after plaintiff entered into possession, defendant, by direction of his grantee, entered upon plaintiff's premises and gathered apples from the orchard, after having been forbidden to do so by plaintiff. From the time of the parol partition until then E., and his successors in title to the seventy acres, had annually gathered apples from said orchard without having been prohibited. There was no evidence that plaintiff had notice of the existence of any such right or claim when he purchased. Held, that defendant's entry was without right, and he was a trespasser; that a right in the nature of an easement could not be acquired by virtue of the parol agreement by the owner of the seventy acres in the remainder of the farm; that if the right in question was to belong to E. as a personal interest independent of his ownership of the seventy acres, it was not an easement proper, but an estate in the land itself; that it was inconsistent with possession or ownership in severalty, which is the sole and exact result of an effective parol partition; that if the right to enter was a parol license merely, it was revocable at pleasure and was revoked by a conveyance of the one hundred acres without reference thereto; but that whatever was the nature of the right, unless it was a parol license, it required a grant duly recorded to be valid against one purchasing the one hundred acres without notice and in reliance upon the recording act; that the will of E. was not constructive notice to plaintiff, it not having been recorded in the county clerk's office.

It seems, a parol partition may be made of lands owned by tenants in common, provided each party takes and retains exclusive possession of the portion allotted to him; the parol agreement alone cannot terminate the unity of possession.

A right in the nature of an easement cannot be created by a parol agreement for the partition of lands.

Reported below (42 Hun, 363).

(Submitted December 11, 1889; decided January 14, 1890.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made November 16, 1886, which affirmed a judgment in favor of plaintiff entered upon the decision of the county judge of Rensselaer county on trial without a jury.

Statement of case.

This is an action of trespass brought in the County Court, after a suit for the same cause of action, commenced in justice's court, had been discontinued because a plea of title was interposed by the defendant.

The county judge found, as facts, that from 1836 to 1850, two brothers, named John and Elijah Millard, owned as tenants in common a farm of about one hundred and seventy acres in Rensselaer county upon which there was an apple orchard ; that in 1850, they made a parol partition of said farm by which John was to have one hundred acres including the orchard, and Elijah the remaining seventy acres, and as part of the arrangement between them they made an oral agreement by which Elijah, his heirs and assigns, were to have the right to enter upon the part belonging to John and gather one-half of the apples, growing or to grow, in said orchard ; that immediately after the parol partition was made they took possession of their respective portions of the farm and from that time, they and their successors in title, have continued to own and occupy the parts so allotted to them, respectively, without any claim or title being made by either to the land so owned and occupied by the other ; that in 1854 Elijah died leaving a last will and testament by the second clause of which he devised said seventy acres and the appurtenances to the defendant ; that the sixth clause of said will is as follows : "Sixth. I give and bequeath to Elijah I. Millard and to his heirs and assigns forever all my right, title and interest to the apples, growing or to grow, in the premises now occupied by John Millard ;" that the defendant took possession of the seventy acres under the will and occupied them until September, 1861, when he conveyed them "with the appurtenances" to Mary E. Millard, by quit-claim deed, duly recorded, which made no mention of any right, or supposed right, to enter upon the hundred acres and gather one-half of the apples in the orchard thereon ; that March 23, 1870, John Millard conveyed the hundred acres to one William A. Millard by warranty deed duly recorded two days later, and on March 25, 1880, said William A. conveyed the same premises to the plaintiff by a like deed duly recorded the next

Statement of case.

day ; that neither of these deeds contained any reference to a right, or supposed right, of the owner of the seventy acres to enter on the land thereby conveyed and gather apples and that there is no evidence in the case that the plaintiff had notice of the existence of any such right or claim ; that soon after plaintiff went into the possession of the hundred acres under said deed, and shortly before the commencement of this action the defendant, by direction of said Mary E. Millard, entered thereon and gathered apples from said orchard to the value of seven dollars, after he had been forbidden to do so by the plaintiff ; that from the time of the parol partition until the defendant was so forbidden by the plaintiff, Elijah Millard and his successors in title to the seventy acres had annually gathered, apples from said orchard and had never before been prohibited. It was admitted by the parties, although not found as a fact, that twenty new trees were set out in the orchard after the parol partition.

The county judge found as a conclusion of law that the entry of the defendant on the lands of the plaintiff was without right and that he was a trespasser in so doing and judgment was directed against him for the sum of seven dollars, on account of such trespass, besides costs.

Henry L. Landon for appellant. The parol partition of the farm of 170 acres of land, made by John and Elijah Millard in 1850, when they were tenants in common, having been followed by possession on their part of the respective portions partitioned, was valid and binding upon them and their heirs and successors in interest, including subsequent grantees and devisees. (*Wood v. Fleet*, 36 N. Y. 499.) The parol partition, both in regard to the land and the fruit of the orchard, was one entire transaction. (2 *Parsons on Contracts* [7th ed.], § 519.) Such an agreement in regard to the fruit, whether looked at as connected or unconnected with the parol partition of the land, is not forbidden by law, using that word as including equity. It is a parol agreement for an easement, which, under certain circumstances, is upheld by the courts. (*Pier-*

Statement of case.

pont v. Barnard, 6 N. Y. 279; *Pierce v. Keator*, 70 id. 419; *Huntington v. Asher*, 96 id. 604; *Rindge v. Baker*, 57 id. 209; *Wiseman Lucksinger*, 84 id. 31; *Cronkhite v. Cronkhite*, 94 id. 323.) The clause in the deed from defendant to Mary E. Millard, reading "with the appurtenances and all the estate, title and interest therein of the said party of the first part was sufficient to pass the easement to said Mary E. Millard. (*Huttemier v. Albro*, 18 N. Y. 48; Bigelow on Equity, 307, 308.) A parol license is coupled with a grant and a part of the grant is irrevocable. (*Vandenburgh v. Van Bergen*, 13 Johns. 212; *Vandenburgh v. Van Buren*, id. 525; *Jamieson v. Milleman*, 3 Duer, 255; *Babcock v. Utter*, 1 Abb. Ct. App. Dec. 27; *Mendenhall v. Klinck*, 51 N. Y. 246; *Winchester v. Osborne*, 62 Barb. 337; *Rerick v. Kern*, 14 S. & R. 267; *Ricker v. Kelly*, 10 Am. Dec. 38; *Goff v. Oberteuffer*, 3 Phila. 71; *Thompson v. McElarney*, 82 Pa. St. 174; *U. S. v. B. R. R. Co.*, 1 Hughes, 138; *Wood v. Leadbitter*, 13 M. & W. 838; *Wood v. Manley*, 11 Ad. & E. 34.) Plaintiff is chargeable with constructive notice of the right in question, and is, therefore, not a *bona fide* purchaser. (*Williamson v. Brown*, 15 N. Y. 354; *Cook v. Travis*, 20 id. 400; *C. V. Bk. v. Delano*, 48 id. 336; *Ellis v. Horrman*, 90 id. 466; *Parker v. Connor*, 93 id. 188.) The will having been properly proven and duly recorded in conformity to every requirement of the law at the time of such recording, vested the right to the easement in defendant, and no subsequent purchaser is regarded a *bona fide* purchaser as against such record. (3 R. S. [7th ed.], 2215, 2222, §§ 1, 38; id. 58, § 14; 2 Edm., 59; Laws of 1837, chap. 460, § 18; 4 Edm., 490; Code Civ. Pro., § 2623; Laws of 1846, chap. 182, § 1; Laws of 1869, chap. 748, § 1; *Varick v. Briggs*, 22 Wend., 543.)

Robertson, Fisk & North, and J. M. Whitman for respondent. The appeal should be dismissed, as the title to real estate does not come in question within the meaning of section 191, subdivision 3 of the Code of Civil Procedure. (*Scully v. Saun-*

Opinion of the Court, per VANN, J.

ders, 77 N. Y. 598; *Langdon v. Guy*, 91 id. 660.) The defendant has failed to show any right, either in himself or in the person for whom he was acting, when the trespass was committed, to enter upon plaintiff's premises and carry away apples. (*Grant v. Chase*, 17 Mass. 443; *Barker v. Clark*, 4 N. H., 380; *Grubb v. Guilford*, 4 Watts, 223-246; *Simmons v. Cloonan*, 81 N. Y. 557-565.) The alleged right to the apples in question was a license and not an easement. (*Washburn on Easements*; 3 Kent's Com., 565, 566; *Cronkite v. Cronkite*, 94 N. Y. 323.) An easement can only be created by deed or grant, or by prescription, from which a grant may be inferred. (3 Kent's Com., 419.) The tenancy in common consists in nothing but unity in possession; and when that is severed by partition, *followed by possession* of the allotted portion, it gives to each an exclusive estate in full in that portion. (*Jackson v. Bradt*, 2 Caines, 174; *Jackson v. Harder*, 4 Johns. 202; *Jackson v. Anderson*, 4 Wend., 477.) The plaintiff in this case is conceded to have been a subsequent purchaser in good faith and for a valuable consideration of the 100 acres in which the defendant claims this right. (3 R. S. [7th ed.], 2215.)

VANN, J. It is not open to discussion in this state that a parol partition may be made of lands owned by tenants in common, provided each party takes and retains exclusive possession of the portion allotted to him. (*Wood v. Fleet*, 36 N. Y. 499; *Mount v. Morton*, 20 Barb. 123; *Ryers v. Wheeler*, 25 Wend. 434; *Jackson v. Livingston*, 7 id. 136; *Jackson v. Christman*, 4 id. 277; *Jackson v. Sellick*, 8 J. R. 270; *Jackson v. Harder*, 4 id. 202; *Freeman on Co-tenancy and Partition*, § 398; *Knapp on Partition*, 465.)

A tenancy in common exists when there is merely unity of possession, either with or without a union of other interests. The result of a parol partition, when carried into effect by each tenant taking exclusive possession of his own share and surrendering possession of all the other shares according to the allotment, is to destroy the unity of possession, and thus the

Opinion of the Court, per VANN, J.

parties by their acts only, without a deed, cease to be tenants in common of the whole, and each becomes the tenant in severalty of a part. The unity of possession is severed and the partition is effected by the acts of the parties in taking exclusive possession of their respective shares by common consent. While the form of the transaction is a parol agreement followed by the act of taking exclusive possession, each of his part, the substance is the act itself. A parol agreement simply cannot terminate the unity of possession. Standing alone it would be ineffectual for any purpose. The partition springs from the act of each tenant, with the consent of the others. Although practically a substitute for, it is not equivalent to mutual conveyances, which would sever the unity of possession, even if not followed by actual possession. No title is transferred by a parol partition, even when it is carried into effect, as it acts only upon the unity of possession and by ending that accomplishes the object in view. It ascertains and defines the limits of the respective possessions. Possession under a tenancy in common, is *per mie* and not *per tout*, and as each tenant owns an undivided fraction, he cannot know where that fraction is until a division has been made. (4 Kent, 367, 371; 2 Black. Com. 191, 194.) While his title remains the same after partition as it was before, his part is separated and identified by the division. (Allnott on Partition, 124, 129; *Corbin v. Jackson*, 14 Wend. 621, 625.) It follows from these views, which are supported by the authorities already cited, that a right in the nature of an easement cannot be created by a parol agreement for the partition of lands, because that involves something besides a severance of the unity of possession. It implies a grant, by which the right is either reserved or conveyed. (*Wiseman v. Lucksinger*, 84 N. Y. 31.) It is something carved out of one parcel of land, the servient, for the benefit of another, the dominant. "It is an interest in or over the soil," and "can only be acquired by grant, and ordinarily by deed * * * a parol license being sufficient for the purpose." (Washburn on Easements, 3-7.) Considering the nature of an easement and the means necessary to create it, we do not think

Opinion of the Court, per VANN, J.

that a right of that character was acquired by the owner of the seventy acres with reference to the remainder of the tract.

If, by virtue of the parol agreement, the right in question was to belong to Elijah Millard, as a personal interest independent of his ownership of the seventy acres, it was not an easement, proper, but an estate in the land itself. The right to take a part of the soil or produce of land, known as *profit a prendre*, requires a grant, or prescription from which a grant is presumed. (*Pierce v. Keator*, 70 N. Y. 419, 422; *Post v. Pearsall*, 22 Wend. 425, 433; 2 Washburn on Real Property, 276, 338; *Rapalje & Lawrence Law Dict.* title Profit.) It is inconsistent with possession or ownership in severalty, which is the sole and exact result of an effective parol partition. When unity of possession ends, possession in severalty begins and the partition is accomplished. It cannot fall short of this result, if it takes effect at all, and it cannot go beyond it.

If the right to enter and take away apples, as contended for, was merely a parol license, it was revocable at pleasure and the conveyance of the hundred acres without reference thereto effected a revocation. (*Cronkhite v. Cronkhite*, 94 N. Y. 323; *Shepherd v. McCalmont Oil Co.*, 38 Hun, 37; Washburn on Easements 7.)

But, whatever the nature of the right, as claimed, was, we agree with the learned General Term that, as it was not, and could not be, made a matter of record, the recording act, supervened and protected the plaintiff. Subsequent to the parol partition the parcel of one hundred acres was twice conveyed by deeds duly recorded, neither of which contained any reference to the right or claim in question. There was no visible sign of its existence and nothing apparent in the use or possession of either tenement to put a purchaser upon inquiry, while the record title contained no suggestion upon the subject. If the verbal agreement had not been limited simply to one-half of the apples, but had embraced one-half of all the annual products of the farm, it would have been the same in principle. Unless the right was a parol license it required a grant, duly placed upon record, in order to be valid

Statement of case.

against one purchasing in reliance upon the recording act. (4 R. S. [8th ed.] 2469.) The will of Elijah Millard was not constructive notice to the plaintiff because, aside from any other question, it was not recorded in the county clerk's office, but in the surrogate's office only. Section 2633 of the Code of Civil Procedure was not in force on the 26th day of March, 1880, when the plaintiff's deed was recorded. (Code C. P. §§ 2633, 3356.)

We think that the judgment should be affirmed, with costs. All concur, except HAIGHT, J., not voting.
Judgment affirmed.

ARTHUR BURNS THOMSON, Respondent, v. JOSHUA C. SANDERS,
Appellant.

In 1872, one W. recovered a judgment in South Carolina against the plaintiff in this action of which the defendant herein was the beneficial owner, although he had not the legal title. In August following, W. brought an action in this state upon the judgment. Plaintiff, by his answer therein, alleged that no process was served upon him in the South Carolina action, and that he neither appeared nor authorized an appearance in his behalf. Under a compromise agreement plaintiff paid defendant \$500 and the latter gave his bond, conditioned to indemnify and save plaintiff harmless against all claims set forth in the complaint in that action and against all costs and damages plaintiff may be compelled to pay, by reason of said action, or the claims upon which the same is based. The legal title to the South Carolina judgment was afterwards assigned to defendant, who brought an action upon it against plaintiff, alleging that he was induced to compromise with him by fraud. Plaintiff answered, and the complaint was dismissed, because of the omission of defendant to tender back the \$500. This action was brought upon defendant's bond, to recover the costs and expenses incurred by the plaintiff in excess of those recovered in the action. Defendant set up as a counter-claim that he compromised with plaintiff, relying upon the truth of his allegations in his answer in the suit brought by W. in this state, and otherwise made by him; that such allegations and representations were false and fraudulent, and asked to recover the damages sustained by reason of the fraud. *Held*, that defendant's liability upon his bond was not limited to such costs and damages as plaintiff should incur in the prosecution of the claim against him by W., but included such as should arise from the prosecution of it by any other party having title to it; that the answer

118	252
132	196
118	252
151	128

Statement of case.

set up a proper counter-claim; that as the counter-claim seeks not to rescind the compromise, but simply to recover damages, because of the alleged fraud, no restoration of the \$500 so received by plaintiff from defendant upon the compromise was essential, but it might be retained by him and taken into consideration on the question of damages. Also, *held*, that the former action brought by plaintiff was not a bar.

(Argued December 11, 1889; decided January 14, 1890.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made April 1, 1887, which affirmed a judgment in favor of plaintiff, entered upon a verdict and affirmed an order denying a motion for a new trial.

The facts out of which this action arose, are, that in 1872, Levi P. Wagner, recovered in the court of Common Pleas of Charleston county, state of South Carolina, a judgment against the plaintiff and two other persons for upwards of \$4,000, of which judgment the defendant herein was the beneficial owner, although he had not the legal title. In August following, an action was brought in the name of Wagner, upon such judgment, in the Supreme Court of the state of New York, against the judgment debtors. The plaintiff by his answer in that action, alleged that no process was served upon him in the South Carolina action, and that he neither appeared or authorized an appearance in his behalf therein. Wagner having died, Julia E. Wagner was substituted as plaintiff in the action in the Supreme Court, and afterwards, during its pendency the plaintiff and the defendant herein made a compromise and settlement of the matter, by which the plaintiff paid to the defendant \$500, and the latter made and delivered to Thomson an instrument of which the following is a copy :

"Know all men by these presents, that, I, Joshua C. Sanders, of the city of New York, am held and firmly bound unto Arthur Burns Thomson, of the same place, in the sum of one thousand dollars (\$1,000), lawful money of the United States of America, to be paid to the said Arthur Burns Thomson, his executors, administrators or assigns; for which payment, well and truly to be made, I bind myself and my heirs, execu-

Statement of case.

tors and administrators, firmly by these presents. Sealed with my seal. Dated the thirteenth day of April, one thousand eight hundred and seventy-six. The condition of this obligation is such that if the above bounden Joshua C. Sanders shall indemnify and save harmless said Arthur Burns Thomson against all claims set forth in the complaint and supplemental complaint in an action in the Supreme Court against said Thomson and others, defendants, by Julia E. Wagner, as administratrix of Levi P. Wagner, deceased, plaintiff; and also against all costs and damages which said Thomson may be compelled to pay by reason of said action or claims upon which the same is based, then the same to be void, otherwise to remain in full force and effect."

"JOSHUA C. SANDERS, [L. s.]

"Witness, E. B. CONVERS."

Afterwards the legal title to the South Carolina judgment was assigned by one Beecher (who had taken an assignment of it from the administratrix) to defendant, who brought an action upon it against Thomson, alleging by way of relief from the effect of the compromise, before mentioned, that he was induced by fraud to make it. Thomson answered, the issues came on to trial and the complaint was dismissed because of the failure of defendant to tender back the \$500 before suit brought. This action was brought upon the defendant's bond to recover the costs and expenses incurred by the plaintiff in excess of those recovered in the last mentioned action. The defendant amongst other matters alleged in his answer by way of counter-claim, that he made the compromise in reliance upon the truth of the allegations made by Thomson, in his answer in the Wagner action, and otherwise made by him, to-wit, that he was not served with process in the South Carolina action and that he neither appeared or authorized any appearance for him in that action; that such allegations and representations were false and fraudulent, and that as the consequence the defendant sustained damages in an amount stated, for which he asks a recovery.

Some further facts appear in the opinion.

Statement of case.

D. Cady Herrick for appellants. The claim for additional costs set up in this action by plaintiff, arising from the action of Sanders against him, might have been litigated and determined in that action; failing to do so, he is estopped from litigating it in this action. (*Yates v. Fussett*, 5 Den. 28; *Matthews v. Duryea*, 45 Barb. 69; *Stowell v. Chamberlain*, 60 N. Y. 272; *Smith v. Smith*, 79 id. 634.) The court at General Term erred in sustaining the rulings of the judge at trial term, holding that "there does not seem to have been any error committed on the trial." (*Gould v. C. C. N. Bank*, 86 N. Y. 75, 84; 99 id. 333, 337.) The claim set up by the defendant in his answer, was a proper counter-claim to the claim set up by the plaintiff in the complaint, within section 501 of the Code of Civil Procedure. (*Carpenter v. M. L. Ins. Co.*, 93 N. Y. 556; *G. H. M. Co. v. Hall*, 61 id. 235, 236, 237; *Cass v. Higenbotom*, 100 id. 248; Moak's Van Santvoord's Pleadings [3d ed.], 628.) The defendant cannot be held liable on the bond beyond its precise term. (*Belloni v. Freeborn*, 63 N. Y. 388; *Gates v. McKee*, 13 id. 236; *Hamilton v. Van Rensselaer*, 43 id. 244; *Melick v. Know*, 44 id. 679; *Bancroft v. Winspear*, 44 Barb. 212.) The term "cost and damages" as used in the bond, had reference solely to such as might be adjudged against the plaintiff herein in the Wagner action. (*Low v. Archer*, 12 N. Y. 277, 282; *Armstrong v. Percy*, 5 Wend. 536, 540; *Hallock v. Belcher*, 42 Barb. 199; *Scott v. Tyler*, 14 id. 202, 204.) The court at General Term also erred in holding that "the bond in question is general in its terms," that its terms are as limitless as undertakings given in the issuing of attachments or injunctions, or on levy and sale on execution by the sheriff. (*Westervelt v. Smith*, 2 Duer, 449; *Trustees, etc. v. Gallatin*, 4 Cow. 340; *Corcoran v. Judson*, 24 N. Y. 106; *Bancroft v. Winspear*, 44 Barb. 209.) There has been no adjudication on the issues raised in this action. (*Brown v. Gallaudet*, 80 N. Y. 413, 417.)

E. B. Convers for respondent. The validity of the bond of indemnity is *res adjudicata* by the final judgment on the

Opinion of the Court, per BRADLEY, J.

merits in the former action between the same parties in the City Court of New York, wherein the same issues were joined with respect to its construction and the alleged fraud in its inception. (*Davis v. Tallcott*, 12 N. Y. 184; *Patrick v. Shaffer*, 94 id. 423; *Griffen v. R. R. Co.*, 102 id. 449; *Scott v. Pilkington*, 2 B. & S. 10; *Patrick v. Shaffer*, 94 N. Y. 423.) The damages claimed are recoverable under the bond. (Cowen's Treatise [4th ed.], § 1515; Burrill's Law Dictionary, tit. "Damages," "Costs;" *Smith v. Compton*, 3 B. & Ad. 407; *Westervelt v. Smith*, 2 Duer, 444; *Chamberlain v. Beller*, 18 N. Y. 115; *Trustees, etc., v. Galatin*, 4 Cow. 340; *Northup v. Garrett*, 17 Hun, 497; *Edwards v. Bodine*, 11 Paige, 223; *Corcoran v. Judson*, 24 N. Y. 106; *Strong v. DeForest*, 15 Abb. 427.) This action is on contract for a breach of the conditions of the bond. The alleged fraud in procuring the compromise and the release from the South Carolina judgment is not available as a defense herein, nor by way of counter-claim. (Code Civ. Proc., § 501; *People v. Dennison*, 84 N. Y. 172; *Edgerton v. Page*, 14 How. Pr. 164; *Mayor, etc., v. S. Co.*, 12 Abb. Pr. 300; *Bank v. Lee*, 7 id. 372; *Agate v. King*, 17 id. 159; *Barhyte v. Hughes*, 33 Barb. 320.) The retention of the fruits of this settlement is a conclusive election to affirm it. (*Schiffer v. Dietz*, 83 N. Y. 300; *Strong v. Strong*, 102 id. 69; *Francis v. R. R. Co.* 108 id. 93.)

BRADLEY, J. It is contended on the part of the defendant that the purpose of the bond made by him to the plaintiff, was merely to indemnify the latter against any claim which might be made by Wagner, and the costs and damages resulting to him from the assertion or prosecution of any claim made by Wagner upon the South Carolina judgment, and that it is entitled to such construction, and therefore the bond cannot support an action to recover the costs or expenses incurred by the plaintiff in the defense of the action brought against him by the defendant. The terms of that instrument do not seem to so limit its operation and effect. In the condition of the bond is first described the claim against which the plain-

Opinion of the Court, per BRADLEY, J.

tiff is indemnified, it then proceeds to indemnify him against all costs and damages which he should be compelled to pay by reason of the Wagner action or claims on which it was based. The claim in view and mentioned was the South Carolina judgment. The indemnity seems to have embraced such costs and damages as the plaintiff should be subjected to, not only in that action but by reason of any claim made against him founded upon such judgment. The relation of the defendant assumed to it was such as to enable him to control the judgment, and he undertook to relieve the plaintiff from its effect as a cause or claim against him for prosecution and its consequences. This would seem to include within its purpose, as represented by its terms, the protection of the plaintiff against the costs and damages resulting to him from the prosecution by any person having the apparent title to it, of any claim founded upon the judgment. Such has been the effect given to it by adjudication which is controlling here upon that question. It appears that after the discontinuance of the Wagner action against the plaintiff in the Supreme Court of this state, the then plaintiff in that action assigned the judgment to one Beecher, who brought an action upon it against the defendant which the latter defended. The discontinuance of that action was procured by the defendant, and thereupon the plaintiff brought against him an action on this bond of indemnity in the City Court of New York, to recover the costs or expenses of defending the Beecher action and recovered. That judgment remains effectual, and must here be deemed to have conclusively established, as between these parties, that the liability of the defendant upon the bond was not limited to such costs and damages as the plaintiff should incur in the prosecution of the claim of Wagner, but included such as should arise from the prosecution of it by any other party having the apparent title to it. (*Doty v. Brown*, 4 N. Y. 71; *Castle v. Noyes*, 14 N. Y. 329; *Pray v. Hegeman*, 98 N. Y. 351.) The conclusion would seem to follow that the operation of the bond extended to the action prosecuted upon the judgment by the defendant against the plaintiff, so as to afford to the latter the

Opinion of the Court, per BRADLEY, J.

indemnity for such costs and damages, if any, which he reasonably incurred in excess of the costs recovered in such action.

It is alleged in the answer that the action so brought by the defendant against the plaintiff came on to trial, and that the complaint was dismissed on the ground that the \$500, paid to and taken by defendant upon the compromise pursuant to which the bond was made, had not been paid or tendered back to the plaintiff. That was the necessary result of an action brought upon the judgment, because its support by the defendant was dependent upon the rescission of the agreement constituting the compromise, which could be done for the purpose of an action of law, only by tender of restoration by the defendant of that which he had received from the plaintiff. The record of that action is not here, but by the pleadings and evidence in the present case, it appears to have been an action upon the judgment, and that the allegations of fraud on the part of the plaintiff in obtaining the settlement and bond, were intended to furnish a reason for its support.

The alleged cause of action there was different from that set forth in the defendant's answer in this action by way of counter-claim. And for that reason the recovery there would have been no bar to the latter if the dismissal had been on the merits. (*Stowell v. Chamberlain*, 60 N. Y. 272.) But it does not so appear. (Code, § 1209.)

The evidence offered by the defendant with a view to prove the alleged fraud was excluded and exception taken. The question therefore arises whether the matter alleged constituted a counter-claim within the statute, which provides that it must be a cause of action against the plaintiff tending to diminish or defeat his recovery, arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim or connected with the subject of the action. (*Id.* § 501.)

It is alleged in the answer, that the defendant was induced to make the compromise and give the bond of indemnity by the false and fraudulent representations of the plaintiff, made, in the manner stated, with the intent to deceive him, and that as the consequence of such fraud on the part of the plaintiff

Opinion of the Court, per BRADLEY, J.

the defendant sustained damages for which he demanded judgment. This alleged cause of action of the defendant arose out of the transaction or contract, of which the bond set forth in the complaint as the foundation of the plaintiff's claim was the product, and the making of it constituted a part, and such cause of action alleged by the defendant comes within the meaning of a counter-claim as defined by the statute. (*Litchult v. Treadwell*, 7 Wkly. Dig. 83; affirmed, 74 N. Y. 603; *Carpenter v. Manhattan Life Ins. Co.*, 93 N. Y. 552.) The view of the General Term was, that as the situation remained the same as it was when the complaint in the action of the defendant against the plaintiff was dismissed, the alleged counter-claim was not available for the reason then existing for the disposition made of that action. It seems to have been assumed that the restoration of the amount paid by the plaintiff to the defendant was essential to the right of the latter to assert such counter-claim. That would have been so if it had been an alleged cause of action upon the South Carolina judgment, as its support would have been dependent upon rescission of the agreement which produced the bond, but the asserted counter-claim is a cause of action founded solely upon alleged fraud, for which the defendant seeks to have allowed to him the damages he sustained by it.

In making this claim the defendant does not proceed in disaffirmance of the agreement of compromise, that, and the bond of indemnity remain effectual, subject only to his claim for such damages as he may legitimately have sustained by reason of the fraud with which he charges the plaintiff. For the purpose of such relief no restoration was essential. What the defendant received as the result of the agreement may be retained by him, and taken into consideration upon the question of damages in the event the claim for them is supported at the trial. (*Gould v. Cayuga Co. Nat. Bank*, 99 N. Y. 333.)

These views lead to the conclusion that the judgment should be reversed and a new trial granted, costs to abide the event.

All concur.

Judgment reversed.

Statement of case.

FAIRBANK CANNING COMPANY, Respondent, v. SETH X.
METZGER et al., Appellant.

Defendants contracted to purchase dressed beef of plaintiff, which the latter agreed should be beef that had not been heated before being killed; the beef to be delivered on board of cars at Chicago. In an action to recover the purchase-price, *held*, that plaintiff's agreement amounted to an express warranty, which survived delivery and acceptance; and that defendants were entitled to recover damages, by reason of a breach thereof, by way of counter-claim.

It is not necessary, in order to constitute an express warranty on sale of goods, that the word "warranty" should be used; a positive affirmation as to quality, understood and relied upon by the vendee as such, is sufficient. The right to recover damages for the breach of such a warranty survives acceptance.

As to whether the vendee has the right to return the property on discovery of the breach, *quære*.

F. C. Co. v. Metzger (43 Hun, 71), reversed.

(Argued December 11, 1889; decided January 14, 1890.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made January 11, 1887, which affirmed a judgment in favor of plaintiff entered upon the report of a referee.

This action was brought to recover the contract price of a car load of dressed beef.

The answer averred, by way of counter-claim a warranty, that the meat should be clean, well-dressed, and in first class condition, not heated before being killed, and a breach thereof by reason of which defendant sustained damage.

The following facts appeared:

The plaintiff is a corporation engaged in buying and slaughtering cattle and selling fresh dressed beef in Chicago. The defendants are co-partners engaged in wholesaling and retailing meat. In February, 1883, the plaintiff by letter solicited the defendants to purchase from it what dressed beef they required. It resulted in a contract, made entirely by correspondence, for meat to be wholesaled from the car by defendant's agent

Statement of case.

from Dunkirk to Elmira, the portion remaining unsold when the cars should reach Elmira to be retailed by the defendants. The defendants ordered at different times four car loads of fresh beef and, pursuant to their agreement, on receipt of the bill for the second and third car loads, and before the arrival of the goods, paid the plaintiff therefor by a draft on New York.

The referee found as facts: That the plaintiff was to deliver the beef on board the cars at Chicago, which was a delivery to the defendants, and the same then and there became the property of the defendants. That by the agreement made between the parties the plaintiff represented and agreed to furnish the defendants beef that had not been heated before being killed; that should be thoroughly chilled before being loaded on the cars; that it should be in first class condition in every respect and merchantable. That a portion of the meat furnished, including all of the fourth car load, had been heated before being killed and was not in first class condition or merchantable when shipped at Chicago. That as to the fourth car load the "defendants did all they could to dispose of it, and save what they could from it, after the car had been opened several times on different days between Dunkirk and Elmira and finding they could not use it they shipped back to the plaintiff 12,991 pounds, and notified plaintiff by wire of the same, and plaintiff immediately wired back that they would not receive it, whereupon the defendants ordered the same back to Elmira."

The referee found, as a matter of law, that there was no warranty, and directed a judgment to be entered in favor of the plaintiff for the contract price.

Further facts appear in the opinion.

Gabriel L. Smith for appellant. There is a warranty established in this case as a matter of law. (*Dwight v. G. L. Ins. Co.*, 103 N. Y. 342; *Brady v. Cassidy*, 104 id. 155; *T. G. C. Co. v. Smith*, 110 id. 87; *Smalley v. Henderson*, 5 Dutcher 371; *Brown v. Bigelow*, 10 Allen, 244; 2 Schouler on Per-

Statement of case.

sonal Property, 327; Benjamin on Sales, §§ 600, 613; *Hawkins v. Pemberton*, 51 N. Y. 198. *Kent v. Friedman*, 17 Wkly Dig., 484; 18 Alb. L. J., 324; *Beals v. Olmstead*, 24 Vt., 114; *Pease v. Sabin*, 38 id. 432; *Jones v. Bright*, 5 Bing. 533; *Bragg v. Morrell*, 49 Vt. 45; *Leopold v. Van Kirk*, 27 Wis. 152; *Brown v. Murphee*, 21 Miss. 91; *Cunningham v. Hall*, 1 Sprague, 404; *Beers v. Williams*, 16 Ill. 69; *Walton v. Cody*, 1 Wis. 420; *Brenton v. Davis*, 8 Blackf. 317; *R. M. Works v. Chandler*, 56 Ind. 575; *Fisk v. Tauk*, 12 Wis. 276; *Rogers v. Niles*, 11 Ohio St. 48; Benjamin on Sales, §§ 656, 918, 966, 988; *Brown v. Edgington*, 2 M. & G. 279; *Jones v. Bright*, 5 Bing. 533; *P. C. I. Co. v. Groves*, 68 Penn. 149; *R. M. Works v. Chandler*, 56 Ind. 575; *Taylor v. Cole*, 111 Mass. 363; *Gautier v. Douglass*, 13 Hun, 154; *Howard v. Hoey*, 23 Wend. 350; *Van Wight v. Allen*, 69 N. Y. 61; *Hoe v. Sanburn*, 21 id. 552; Story on Sales, § 371; *Cosgrove v. Burnett*, 31 Alb. L. Jour. 140; 2 Schouler on Sales, 355; *Pease v. Sabin*, 3 Veasey, 432; *Hogins v. Plympton*, 11 Pick. 99-100; *Winsor v. Lombard*, 18 id. 60; *Henshaw v. Robbins*, 9 Metc. 87; *White v. Miller*, 17 N. Y. 129; *Jones v. Just*, L. R. [3 Q. B.], 107; *Laing v. Fidgeon*, 4 Camp. 169; *Granmiel v. Gunby*, 52 Ga. 504; *Rive v. Forsyth*, 41 Md. 389; *Hoe v. Sanburn*, 21 N. Y. 552; *Brown v. Sayles*, 27 Vt. 227; *Dutton v. Gerrish*, 9 Cush. 89; Benjamin on Sales, §§ 983, 989; *Howard v. Hoey*, 23 Wend. 350; *Merriam v. Field*, 24 Wis. 640; 39 id. 578; *Peck v. Armstrong*, 38 Barb. 215; *Spence v. Duffield*, 1 Ans. Jur. Rep. 74; 18 Alb. L. Jour. 325; *Beir v. Walker*, 46 L. J. [C. P.] 677; *Moses v. Mead*, 1 Denio, 378; 5 id. 617; *Copas v. A. A. P. Co.*, Supr. Ct. of Mich., Feb. 1, 1889; *Birch v. Spencer*, 15 Hun, 504; *Leopold v. Van Kirke*, 27 Wis. 152; *Smith v. Richards*, 13 Pet. 30, 42; *Kent v. Friedman*, 17 Wkly. Dig. 484; 101 N. Y. 616; *Dounce v. Dow*, 64 id. 416; *Briggs v. Hilton*, 99 id. 517.) There was no such acceptance of the beef by the defendants, as waived their right to damages against the plaintiffs for their breach of contract. (Benjamin on Sales, § 92; Hare on Contracts, 396; *Knapp v. Simon*, 96 N. Y. 290;

Statement of case.

Reed v. Randall, 39 id. 358; *Beck v. Sheldon*, 48 id. 365; *Dutchess Co. v. Harding*, 49 id. 321; *G. Mfg. Co. v. Allen*, 53 id. 515; *Dounce v. Dow*, 64 id. 411; *Gautier v. D. Mfg. Co.*, 13 Hun, 514, 525; *Dodge v. McCormick*, 22 Wkly Dig. 517; *Maxwell v. Lee*, 27 N. W. Rep. 196; *Thompson v. Libby*, 29 id. 150; *C. I. Co. v. Pope*, 108 N. Y. 232; *Norton v. Dreyfuss*, 106 id. 94; *Gurney v. A. & G. W. R. Co.*, 58 id. 358; *Pierson v. Crooks*, 26 N. Y. S. R. 492; *Sprague v. Blake*, 20 Wend. 64; *Muller v. Eno*, 14 N. Y. 597; *Day v. Pool*, 52 id. 416; *Parks v. M. A. & T. Co.*, 54 id. 587; *Gurney v. A. & G. W. R. Co.*, 58 id. 358; *Brigg v. Hilton*, 99 id. 529; *Brown v. Foster*, 108 id. 387; *Studer v. Bleistein*, 26 N. Y. S. R. 400; *Case v. Simonds*, id. 832; *Divine v. McCormick*, 50 Barb. 116; *Hamilton v. McPherson*, 28 N. Y. 72; *Johnson v. Mecker*, 96 id. 97; *Atkins v. Elwell*, 45 id. 753.)

Henry S. Redfield for respondent. There was no warranty as to the quality and condition of the beef. (*O. M. Soc. v. Lawrence*, 4 Cow. 440; *Duffy v. Mason*, 8 id. 25; *Rogers v. Ackerman*, 22 Barb. 134; *Greenthal v. Schneider*, 52 How. 133; *Bartlett v. Hopcock*, 34 N. Y. 118; *Shippen v. Bowen*, 122 U. S. 575; *Hallock v. Mallett*, 13 N. Y. S. R. 263; *Chalmers v. Harding*, 17 L. T. [N. S.], 571; 2 Schouler, 335; Benjamin on Sales [4th ed.], 599, 806, §§ 610, 929.) Even if this were a case of express warranty, the defendants could not recoup damages for the breach thereof, after acceptance and sale of beef, because the defects were open and visible and known. (*Day v. Pool*, 52 N. Y. 146; *Parks v. M. A. Co.*, 54 id. 586; *Dounce v. Dow*, 57 id. 16; *Briggs v. Hilton*, 99 id. 517; *Bennett v. Buchan*, 76 N. Y. 386; *Brown v. Burhans*, 4 Hun, 227; *G. C. M. Co. v. Mann*, 3 N. Y. S. R. 301; *Vanderwalker v. Osmer*, 65 Barb. 556; *Studer v. Bleistein*, 26 N. Y. S. R. 400.) This was an executory contract of sale. The representation as to kind and quality of beef was part of the contract of sale itself, descriptive simply of the articles to be delivered in the future. The

Opinion of the Court, per PARKER, J.

defects existing in the beef upon its arrival at Dunkirk and receipt and acceptance by defendants, were open and visible, as appears by the foregoing testimony of the defendant's own witnesses. This being the case they are bound by the receipt and acceptance of the beef, an acceptance in such case being a waiver of any defects and a consent that the articles received correspond with the contract. (*Hogan v. Plympton*, 11 Pick. 97; *Winsor v. Lombard*, 18 id. 57; *Hawkins v. Pemberton*, 51 N. Y. 198; *White v. Miller*, 71 id. 118; *Passenger v. Thorburn*, 34 id. 634; *Van Wyck v. Allen*, 69 id. 61; Benjamin on Sales [4th ed.], § 918; *Reed v. Randall*, 29 N. Y. 358; *Beck v. Sheldon*, 48 id. 365; *D. Co. v. Harding*, 49 id. 321; *G. M. Co. v. Allen*, 53 id. 515; *Dounce v. Dow*, 64 id. 411; *C. I. Co. v. Pope*, 108 id. 232; *Wallace v. Blake*, 18 N. Y. S. R. 922; *Maxwell v. Lee*, 27 N. W. Rep. 196; *Thompson v. Libby*, 29 N. W. Rep. 150; *Studer v. Bleistein*, 26 N. Y. S. R. 400; *Van Bracklin v. Fonda*, 12 Johns. 467; *Diven v. McCormick*, 50 Barb. 116; *Moses v. Mead*, 1 Den. 378; 5 id. 617; *Mee v. McNider*, 39 Hun, 345; 109 N. Y. 500; *Pierson v. Crooks*, 26 N. Y. S. R. 492; *Lessee v. Perkins*, 20 id. 933; *Pope v. Allis*, 115 U. S. 363; *G. M. Co. v. Allen*, 53 N. Y. 515; *Reed v. Randall*, 29 id. 358; *Dounce v. Dow*, 64 id. 411; *Studer v. Bleistein*, 26 N. Y. S. R. 400.)

PARKER J. In the absence of a warranty as to quality and a breach, the defendant's claim for damages could not have survived the use of the property. For in such case vendees are bound to rescind the contract and return, or offer to return, the goods. If they omit to do so, they will be conclusively presumed to have acquiesced in their quality. (*Coplay Iron Company v. Pope*, 108 N. Y. 232.) Therefore, if the referee was right in holding that there was no warranty as to quality, collateral to the contract of sale, we need not inquire further, as the judgment must be affirmed. The referee has found the facts and this court may properly review his legal conclusion as to whether they amounted to a warranty.

Opinion of the Court, per PARKER, J.

"A warranty is an express or implied statement of something which a party undertakes shall be a part of a contract, and, though part of the contract, collateral to the express object of it." (2 Schouler on Personal Property, 327.) All contracts of sale with warranty, therefore, must contain two independent stipulations:

First. An agreement for the transfer of title and possession from the vendor to the vendee.

Second. A further agreement that the subject of the sale has certain qualities and conditions.

It is not necessary that in the collateral agreement the word warranty should be used. No particular phraseology is requisite to constitute a warranty. "It must be a representation which the vendee relies on and which is understood by the parties as an absolute assertion, and not the expression of an opinion." (*Oneida Manufacturing Society v. Lawrence*, 4 Cow. 440.) It is not necessary that the vendor should have intended the representation to constitute a warranty. If the writing contains that which amounts to a warranty the vendor will not be permitted to say that he did not intend what his language clearly and explicitly declares. (*Hawkins v. Pemberton*, 51 N. Y. 198.) In that case the defendants purchased at auction an article, relying upon the representation of the auctioneer that it was "blue vitriol." It was in fact "Salzburger vitriol," an article much less valuable. In an action brought against the purchaser the trial court directed a verdict for the plaintiff. This was held to be error because the representation at the sale amounted to a warranty.

Judge EARL in delivering the opinion of the court after collating and discussing the authorities upon the subject of warranty, said: "The more recent cases hold that a positive affirmation, understood and relied upon as such by the vendee, is an express warranty."

In *Kent v. Friedman*, (17 Wkly Dig. 484) Judge LEARNED in his opinion says: "There can be no difference between an executory contract to sell and deliver goods of such and such a quality and an executory contract to sell and deliver goods

Opinion of the Court, per PARKER, J.

which the vendor warrants to be of such and such a quality. The former is as much a warranty as the latter." The Court of Appeals subsequently affirmed the judgment of the General Term without an opinion. (101 N. Y. 616.)

In *White v. Miller* (71 N. Y. 118), frequently referred to as the "Bristol cabbage seed case," the Court says: "The case of *Hawkins v. Pemberton* (*supra*) adopts as the law in this state, the doctrine upon this subject now prevailing elsewhere, that a sale of a chattel by a particular description, is a warranty that the article sold is of the kind specified.

So, too, a sale by sample imports a warranty that the quality of the goods shall be equal in every respect to the sample. (*Briggs v. Hilton*, 99 N. Y. 517, and cases cited.)

Now, in the case before us, the defendants undertook to purchase of the plaintiff fresh dressed beef to be wholesaled in part and the residue retailed to their customers. They endeavored to procure good beef. Not only did they contract for beef that was clean, well-dressed, in first class condition in every respect, and merchantable, and that was thoroughly chilled before being loaded on the cars; but further, that they should not be given beef that had been heated before being killed.

When, therefore, the plaintiff placed in a suitable car beef well-dressed and clean, and of the general description given in defendants' order, it had made a delivery of the merchandise sold, and by the terms of the contract was entitled to be paid as soon as the bill should reach defendants and before the arrival of the beef made an examination by defendants possible.

But there was another collateral engagement, and yet forming a part of the contract which the plaintiff had not performed. An engagement of much consequence to the defendants and their customers, because it affected the quality of the meat. Upon its performance or non-performance depended whether it should be wholesome as an article of food. It was of such a character that defendants were obliged to rely solely upon the representation of the plaintiff in respect thereto. The

Opinion of the Court, per PARKER, J.

plaintiff or its agents selected from their stock the cattle to be slaughtered. No one else knew or could know whether they were heated and feverish. Inspection immediately after placing the beef in the car would not determine it. That collateral engagement consisted of a representation and agreement that plaintiff would deliver to the defendants beef from cattle that had not been heated before being slaughtered. Such representation and agreement amounted to an express warranty.

The referee found as a fact: "That the meat had been heated before being killed," therefore there was a breach of the warranty, and the defendants are entitled to recover their damages, by way of counter-claim, unless such right must be deemed to have been subsequently waived.

It is not necessary for the disposition of this case to decide and, therefore, it is not decided, whether a warranty is implied in all cases of a sale of fresh dressed meat, by the party slaughtering the animals, that they were not heated before being killed, and, as some of my associates are averse to any expression whatever upon that question at this time, what is said must be regarded as an individual view rather than that of the court. My attention has not been called to a decision in this state covering that precise question.

It was determined in *Divine v. McCormick* (50 Barb. 116), that in the sale of a heifer for immediate consumption, a warranty that she is not diseased and unfit for food is implied. That decision is well founded in principle, and is in accordance with a sound public policy, which demands that the doctrine of "*caveat emptor*" shall be still further encroached upon, rather than that the public health shall be endangered. I see no reason for applying the rule to one who slaughters and sells to his customers for immediate consumption, and denying its application to one who slaughters and sells to another to be retailed by him. In each case it is fresh meat intended for immediate consumption.

The rule is well settled by the courts of last resort in many of the states that a vendor of an article manufactured by him for a particular use, impliedly warrants it against all such defects.

Opinion of the Court, per PARKER, J.

as arise from his unskillfulness either in selecting the materials or in putting them together and adapting them to the required purpose. (See cases cited in Albany Law Journal, vol. 18, page 324.)

One who prepares meat for the wholesale market may be said to come within that rule. Because he purchases the cattle; determines whether they are healthy and in proper condition for food; and upon his skill in dressing and preparing the meat for transportation a long distance, its quality and condition as an article of diet for the consumer largely depends.

In two of the states at least, it is held that where perishable goods are sold to be shipped to a distant market, a warranty is implied that they are properly packed and fit for shipment, but not that they will continue sound for any particular or definite period. (*Mann v. Everston*, 32 Ind. 355; *Leopold v. Van Kirk*, 27 Wis. 152.)

The respondent insists that the act of defendants' agent in selling some sixty quarters of the beef, before the car reached Elmira, when the defendants, after making a personal examination, immediately shipped that which remained unsold to the plaintiff, constituted a waiver of their claim for damages. It is undoubtedly the rule that in cases of executory contracts for the sale and delivery of personal property, if the article furnished fails to conform to the agreement, the vendee's right to recover damages does not survive an acceptance of the property, after opportunity to ascertain the defect, unless notice has been given to the vendor, or the vendee offers to return the property. (*Reed v. Randall*, 29 N. Y. 358; *Beck v. Sheldon*, 48 N. Y. 365; *Coplay Iron Co. v. Pope*, 108 N. Y. 232.)

But when there is an express warranty it is unimportant whether the sale be regarded as executory or *in presenti*, for it is now well settled that the same rights and remedies attach to an express warranty in an executory, as in a present sale. (*Day v. Pool*, 52 N. Y. 416; *Parks v. Morris Ax & Tool Co.*, 54 N. Y. 586; *Dounce v. Dow*, 57 N. Y. 16; *Briggs v. Hilton*, 99 N. Y. 517.)

Statement of case.

In such cases the right to recover damages for the breach of the warranty survives an acceptance, the vendee being under no obligation to return the goods.

Indeed his right to return them upon discovery of the breach is questioned in *Day v. Pool* (*supra*). And Judge DANFORTH in *Brigg v. Hilton* (*supra*), after a careful review of the leading authorities upon the question states the rule as follows: "Where there is an express warranty, it is, if untrue, at once broken and the vendor becomes liable in damages but the purchaser cannot for that reason either refuse to accept the goods or return them."

It follows from the views expressed that the judgment should be reversed.

All concur, except FOLLETT, Ch. J., not sitting.

Judgment reversed.

AUGUSTIN DALY, Respondent, v. JOHN STETSON, Appellant.

Plaintiff entered into a contract with defendant, by which he sold to him the exclusive right to give performances of certain plays for thirty consecutive weeks. Defendant agreed to pay plaintiff \$200 each week "commencing the first Saturday after said performance begins." In an action to recover an alleged balance due under said contract it was admitted that the performance began as contemplated by the contract. Defendant claimed that the condition of the contract was that he should produce the plays each week and that without proof that he had so done, plaintiff could not recover. *Held*, untenable; that after the commencement of the performance, if defendant neglected or refused to produce the plays, it was a breach of the contract on his part, and did not shield him from his obligation to pay the stipulated price for each week until the end of the time specified.

Defendant set up as a counter-claim a right, as assignee of N., to royalties on a certain play performed by plaintiff. It appeared that a contract was entered into between N. and A., a dramatic author, by which A. assigned to N. for his theatre in New York the exclusive right of performance of all plays, dramas and comedies theretofore or thereafter written by A.; also "all property rights on all these plays for the United States," so that N. "exclusively has the right to give to other stages * * * the permission to perform said plays, to fix and determine the royalties for the same and collect said royalties from the other managers, and * * * to act as the sole proprietor of the same," N. to pay a certain royalty for

Statement of case.

each performance of these plays at his own theatre and one-half of all the royalties received by him "by disposing of his property-right to these plays to the other theatres." An annual accounting was provided for. The contract was to continue two years and after that from year to year unless revoked by one of the parties. In 1881 N., describing himself as an agent of A., entered into a contract with plaintiff, giving him the right to adapt the plays of A., for performances in English, plaintiff to pay to N., as such agent, specified royalties. It also appeared that the two years had expired, and N. had been notified of the revocation of the contract by A., prior to the adaptation by plaintiff of the plays, the royalties claimed for which N. assigned to defendant and which constituted the counter-claim, and plaintiff had procured his rights to that play directly from A. *Held*, that under the contract with A., N. was an agent merely; that he acquired thereunder no title to said plays and upon notice of revocation being given as provided, his agency ceased; and therefore the counter-claim was not sustained.

Reported below (22 J. & S. 202).

(Argued December 11, 1889; decided January 14, 1890.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made February 14, 1887, which affirmed a judgment in favor of plaintiff, entered upon a verdict.

The nature of the action and the facts are sufficiently stated in the opinion.

A. J. Ditenhoefer for appellants. The complaint should have been dismissed on the ground that there was no evidence that the defendant produced the plays during the term for which judgment was rendered. (*Perry v. Dickerson*, 85 N. Y. 345; *Howard v. Daly*, 15 id. 462.) The court erred in dismissing the second and third counter-claims, relating to the production of Von Schoenthan's plays "7-20-8" and the "Passing Regiment." (*Hurd v. Cook*, 75 N. Y. 354; *Depeuw v. Kayser*, 3 Duer, 335; *Hoffman v. A. Ins.*, 32 N. Y. 405-413; *Barlow v. Scott*, 24 id. 40; *Ripley v. Larmouth*, 56 Barb. 31; *Reed v. Bently*, 4 K. & John. 662-663; *Coghlan v. Stetson*, 10 Fed. Rep. 727-729; *Howard v. Hale*, 6 L. T. Rep. 648; *Stoop v. Smith*, 100 Mass. 63-66; *West v. Smith*, 101 U. S. 263.) The first counter-claim relating to L'Arronge's play, "Dollars and Sense," should have been allowed, and it

Opinion of the Court, per HAIGHT, J.

was error to direct its disallowance, if the jury found that plaintiff entered in good faith into the contract with L'Arronge for the same play. (*Lawrence v. Brown*, 5 N. Y. 394; *Baker v. U. M. L. Ins. Co.*, 43 id. 289; *Wilcox v. Howell*, 44 id. 402; *H. M. Co. v. Farrington*, 82 id. 121, 129; *Andrews v. A. L. Ins. Co.*, 85 id. 334; *Widerwax v. Jacques*, 18 Wkly. Dig. 240; *Farrell v. Krum*, 17 id. 471; *Vietor v. I. N. Co.*, 13 J. & S. 142-145; *Parsons on Contracts*, 293, chap. 4, § 9; *Warring v. Somborn*, 82 N. Y. 604; *Wilcox v. Howell*, 44 N. Y. 398; *Royce v. Watrous*, 73 id. 597; *Field v. Mayor, etc.*, 6 N. Y. 179; *Devlin v. Mayor, etc.*, 63 id. 8; *Morton v. Naylor*, 1 Hill, 583; *Hall v. City of Buffalo*, 1 Keyes, 193, 301; *Alger v. Scott*, 54 N. Y. 16; *Lowery v. Steward*, 25 id. 239; *Everson v. Gere*, 40 Hun, 250; *Mitchell v. Winslow*, 2 Story, 630.) The court erred in admitting L'Arronge's letter to plaintiff. (*Dodge v. F. S. Bank*, 93 U. S. 379; *Putman v. Matthewson*, 15 Wkly. Dig. 128.)

Stephen H. Olin for respondent. It was not error to dismiss the second and third counter-claims. (Story on Agency, §§ 462, 466; *Hunt v. Rousmanier*, 8 Wheat. 174; Story on Agency, § 474; *Moller v. Tuska*, 87 N. Y. 169; *Sigerson v. Matthews*, 20 How. [U. S.], 496; Story on Agency, § 403; *Taintor v. Prendergast*, 3 Hill, 72; Story on Agency, 11-16; *Devlin v. Mayor, etc.*, 63 N. Y. 8.) The charge of the court in relation to the first counter-claim was at least as favorable to the defendant as it should have been. (*Nicoll v. Burke*, 13 J. & S. 526-537; *Field v. Mayor, etc.*, 6 N. Y. 186.) There were no errors in the admission or exclusion of evidence. (*Collender v. Dinsmore*, 55 N. Y. 200; *Harrison v. Kirke*, 6 J. & S. 396; *Eighmie v. Taylor*, 98 N. Y. 288; *Stephen's on Evidence*, Art. 90; Code Civ. Proc., § 723; *Levin v. Russell*, 42 N. Y. 251.)

HAIGHT, J. This action was brought to recover a balance alleged to be due upon a contract. The complaint alleged that on or about the 1st day of October, 1883, the plaintiff and defendant made, signed and delivered an agreement the

Opinion of the Court, per HAIGHT, J.

material portions of which are as follows: "Memorandum of agreement made this 1st day of October, 1883, by and between Augustin Daly, manager Daly's theatre, New York, and John Stetson, lessee Fifth Avenue theatre of New York, for themselves and their respective executors, administrators and assigns, to wit, viz.: said Daly hereby sells to said Stetson the exclusive right to give performances of the plays of "Pique" and "Divorce" for thirty consecutive weeks during the theatrical season of 1883-84, commencing on or about Monday, October 22, 1883, in all the cities and towns of the United States and Canadas excepting the city of New York, etc., * * * one performance each night to be given during such period. The said Stetson hereby agrees to pay said Daly the sum of \$200 each week for thirty consecutive weeks commencing on the first Saturday after said performance begins, payable to said Daly in the city of New York".

The complaint further alleged that the defendant, though often requested so to do, had not paid the sums of money due under the agreement or any part thereof, except five sums of \$200 each paid respectively on the 30th day of October, and the 5th, 10th, 17th and 24th days of November, 1883, and that there was still due and owing the sum of \$5,000, besides interest, for which sum judgment was demanded.

The answer does not deny the allegations of the complaint further than that there was the sum of \$5,000 besides interest due and owing. Upon the trial the plaintiff's counsel opened the case to the jury and it was then admitted that the interest upon the \$5,000 claimed by the plaintiff amounted to the sum of \$634.94. Thereupon the plaintiff rested, and the defendant's counsel moved to dismiss the complaint on the ground that the plaintiff cannot recover except upon the performances given by the defendant and that it was incumbent upon the plaintiff to show that the defendant had given the performances; that the condition of the contract is that the defendant perform each week. This motion was denied and an exception was taken which presents the first question which we are called upon to consider.

Opinion of the Court, per HAIGHT, J.

We do not understand that the right of the plaintiff to recover, depends upon a condition that the defendant produces the plays each week. By the terms of the agreement the plaintiff sold to the defendant the exclusive right to give performances of the plays for thirty consecutive weeks, commencing on or about Monday, October 22, 1883; one performance was to be given each night during that period and the defendant agreed to pay the plaintiff the sum of \$200 each week for thirty consecutive weeks, commencing on the first Saturday after the performances began. The performances began as contemplated by the agreement and for five weeks the contract price was paid. If, after that time, the defendant neglected or refused to produce the plays, it was a breach of the contract on his part and does not shield him from his obligation to pay the stipulated price for each week thereafter, until the end of the thirty consecutive weeks mentioned in the contract. It therefore appears to us that the motion was properly denied.

The other questions which we are called upon to consider, relate to the counter-claims set forth in the defendant's answer. It appears that the plaintiff was a theatrical manager and as such had produced at his theatre a play known as "Dollars and Sense," of which one Adolph L'Arronge, of the city of Berlin, Germany, was the author, on which his gross receipts amounted to the sum of \$50,383.76; that he had also produced another play known as "7-20-8," of which F. Von Schoenthan, of Berlin, was the author, the gross receipts of which amounted to the sum of \$49,982.62; and also another play under the name of "The Passing Regiment," by the last named author, the gross receipts of which amounted to \$1,870. It is claimed that one Adolph Neuendorff, of the city of New York, was entitled to a royalty of five per cent upon the gross receipts for the production of these plays and that his claim has been assigned and is now vested in the defendant. Whilst, on the other hand, it is claimed on behalf of the plaintiff that the right to produce these plays was obtained from the authors through their agent in Berlin, and that the royalty accrued has been

Opinion of the Court, per HAIGHT, J.

paid to them. It thus becomes necessary to consider the nature of the defendant's claim to the royalties.

On the 15th of June, 1878, at Berlin, a contract was entered into in writing between Adolph L'Arronge and Adolph Neuendorff, of which the following is a translation: "Between Mr. Ad. Neuendorff, manager of the Germania Theatre in New York, and the dramatic author, Mr. Adolph L'Arronge, in Berlin, is this day the following contract agreed upon and closed:

"After Mr. Ad. Neuendorff to the other contractor, Mr. A. L'Arronge, has paid the sum of five marks in hand, Mr. L'Arronge assign to Mr. Ad. Neuendorff, first; for the Germania Theatre in New York, managed by Mr. A. Neuendorff, the exclusive right of performance of all plays, dramas and comedies composed or arranged by Mr. A. L'Arronge, and which, from to-day forth, will be written by Mr. A. L'Arronge; and also that formerly composed play by Mr. L'Arronge, called 'Mein Leopold.' He furthermore assigns to Mr. Ad. Neuendorff, exclusively, all property rights on all these plays for the United States of America, so that Mr. Neuendorff exclusively has the right to give to other stages in North America, German as well as English, the permission to perform said plays, to fix and determine the royalties for the same, and collect such royalties from the other managers; and furthermore, to have the plays translated and adapted; in short, that Mr. Neuendorff is authorized to act as the sole proprietor of the same.

"Mr. Neuendorff pays to Mr. L'Arronge, for every performance of these new plays at the Germania Theatre in New York, a royalty of five per cent of the gross receipts. All other moneys which Mr. Neuendorff will receive by disposing of his property right to these plays to other theatres of the United States are to be divided equally between Mr. Neuendorff and Mr. L'Arronge, after deducting, first of all, expenses for translation and adaptation, or cost arising from other causes. The account and payment of all moneys due to Mr. L'Arronge must be made every year after the close of the season, at latest, till the first of July.

Opinion of the Court, per HAIGHT, J.

"Mr. L'Arronge binds himself to deliver to Mr. Neuendorff the manuscript of each play, at latest, four weeks after the first performance of said play in Germany or Austria.

"The duration of this contract is determined for the time from July 1, 1878, till July 1, 1880, after the termination of which term it continues from year to year, unless revoked by one of the contractors on or before the first of April of each year."

Subsequently, and on the 27th day of December, 1881, Neuendorff entered into a written agreement with the plaintiff reciting that, whereas, said Neuendorff is the agent of Adolph L'Arronge and several other dramatic authors residing on the continent of Europe for the production, sale and licensing the performances and translations of their unprinted and unpublished plays and dramas throughout the United States and also for the dominion of Canada, it was agreed in consideration of one dollar paid to Neuendorff individually, and one dollar paid to him as agent of the persons named as authors, he, for himself and as agent of the authors named, agreed to deliver to the plaintiff a copy of every unpublished or unprinted play or dramatic composition written by the authors named, or either of them, of which he, Neuendorff, may become the agent, within a reasonable time after he shall receive the same for translation into the English language and assign and grant unto the plaintiff the sole and exclusive right of making adaptations of such plays in English and of performing them on the stage or of causing or permitting to be performed such English versions or adaptations of them throughout the United States and Canada upon payment to said Neuendorff as such agent as aforesaid, for every performance in the city of New York of either such plays performed by the plaintiff a royalty or sum equal to five per cent of the gross receipts of such performances, payable nightly, and of one-half of the net royalties received by the plaintiff for all performances under his licenses given by other persons in any other part of the United States or Canada.

It was further provided that this agreement should apply to all plays and dramatic compositions of the said authors which

Opinion of the Court, per HAIGHT, J.

shall be produced by the plaintiff at any time between the 1st day of January, 1882, and the last day of December, 1884, and that in the event of failure of the plaintiff to make the payments stipulated, that Neuendorff, as the agent of the authors, shall have the right to stop and enjoin each and every performance of the plays.

Afterwards, and about the month of November, 1882, L'Arronge completed a play known in German as "Die Sorglosen" which he sent to Mr. Neuendorff who delivered the same to Mr. Lester Wallack, a theatrical manager, in the city of New York who kept the same until the latter part of March or the 1st of April, 1883, and then returned it to him. In the meantime, the plaintiff, hearing of this play called upon Neuendorff for it and was informed that he had delivered the same to Mr. Wallack and when questioned why he had done so stated that he had done it in consequence of a direction from Mr. L'Arronge who told him that the plaintiff had a good many of his plays which he had not produced, and not to give him any more until he had produced those he had on hand. Thereupon the plaintiff wrote Mr. L'Arronge in reference thereto, who sent the play to him under an arrangement that the royalty was to be paid to him through his agent, Bloch, in Berlin. Subsequently Neuendorff delivered to the plaintiff his copy of the play returned by Wallack. The plaintiff thereupon caused the play to be translated and adapted for production in English upon his stage under the name of "Dollars and Sense."

It further appears that Bloch, who was the general agent at Berlin for Von Schoenthan and L'Arronge, in January, 1883, had correspondence with Neuendorff in reference to unpaid royalties on the contract under which he was collecting them and gave him notice of the termination of the contract of Von Schoenthan and L'Arronge. The letter from Bloch to Neuendorff does not appear in the case, but under date of January 28, 1883, Neuendorff wrote Bloch, from which we extract the following: "First of all I acknowledge the receipt of your letters, in which you notify me that Mess.

Opinion of the Court, per HAIGHT, J.

Schoenthan and L'Arronge consider their contracts with me to be null and void after this season. Of course, I am compelled to accept this notification at the close of the present season, and merely request you to let me have the pieces for the German stage in the future, as promised me in your letter, because in reality I have so far been the only one from whom the authors have received anything tangible for their pieces, so that I should not, in return, be overlooked in the future. Be that as it may, I rely in this matter entirely upon you, my dear Mr. Bloch."

It further appears that Bloch was authorized by the author to terminate the contract in question.

It is now contended that under the contract the title to the play and the right to produce it upon the American stage vested absolutely in Neuendorff. We are consequently called upon to construe the instrument and determine its force and effect. As we have seen Neuendorff first pays to L'Arronge the sum of five marks and L'Arronge assigns to him for the Germania theatre in New York, managed by him, the exclusive right of performance of all plays, dramas and comedies composed or arranged by L'Arronge, and which from that time forth will be written by L'Arronge. Under this clause Neuendorff is given the exclusive right to produce the plays composed by L'Arronge in the Germania theatre in New York during the time specified in the contract to which we shall subsequently call attention. As we understand, the plays in this theatre were produced in the German language and this clause is independent of the subsequent clauses of the contract under which the questions we have to consider arise.

Second. L'Arronge assigns to Neuendorff exclusively all property rights on all of the plays for the United States of America, so that Neuendorff exclusively has the right to give to other stages in North America, German as well as English, the permission to perform the plays, to fix and determine the royalties for the same and to collect such royalties from the other managers, to have the plays translated and adapted, and

Opinion of the Court, per HAIGHT, J.

in short Neuendorff is authorized to act as the sole proprietor of the same.

It is under this clause that it is claimed that Neuendorff became vested with the title to these plays. It is true that the contract contains words and phrases that are not usually found in instruments creating agencies or giving a power to act for one as his attorney or representative, and that some of these words and phrases are common in instruments conveying absolute title, but in construing this instrument we must ascertain, if possible, the purpose and understanding of the parties so as to give effect to their intention. L'Arronge assigns to Neuendorff exclusively all property rights on all of the plays for the United States of America. What for? So as to vest the absolute title in him? No; but so that Neuendorff may give the exclusive right and permission to managers of other stages in North America, German as well as English, to perform the plays. He also assigns to Neuendorff all property rights so as to enable him to fix and determine the royalties for the plays and to collect the same from the other managers. The only property rights connected with these plays is the percentage or royalty that can be obtained from them by their production. It could not have been the intention to assign and transfer to Neuendorff absolutely the royalties or percentage, for subsequently Neuendorff agrees to pay to L'Arronge five per cent on the gross receipts of his own theatre and one-half of the royalty that he gets from the managers of other theatres. "Mr. Neuendorff is authorized to act as sole proprietor of the same." He acts as proprietor so far as others are concerned so that he can give to them the right to produce the plays, etc. But his acting as proprietor for the purpose mentioned in the contract does not of itself make him a proprietor, so far as L'Arronge is concerned. But this contract was to continue from the 1st of July, 1878, to the 1st of July, 1880, and from year to year thereafter until revoked by one of the contracting parties on or before the 1st of April in each year. So that here we have a provision terminating the power of Neuendorff under the contract, after which he cannot act as proprietor or further

Opinion of the Court, per HAIGHT, J.

represent L'Arronge in the collection of royalties. No power is given him to sell, transfer or dispose of the plays or either of them. He is only given the right to perform the plays himself in his own theatre and to give permission to the managers of other stages to perform them and only for such length of time as his power continues under the contract.

It consequently appears to us that when the contract is terminated his power under it is determined, that the rights of all parties claiming under him cease and are determined. That his relation to L'Arronge was that of an agent and representative, which could be terminated under the provisions of the contract, and that this was done by the letters of Bloch which were received by him on or about January 28th, 1883. Undoubtedly his authority under the contract continued thereafter until the close of the season on the 25th day of March thereafter.

Again, it will be remembered that the play of "Dollars and Sense" had not been written at the time this contract was executed. It was not completed until about the month of November, 1882. It was sent to Neuendorff who received it and attempted to place it with Mr. Wallack for production, but failing in that he again obtained it and handed it to the plaintiff. This was the latter part of March or the first of April and after the plaintiff had received the play from the author, and after Neuendorff had been notified of the termination of the contract. It was at about the time that the season closed and his power to act under the contract was terminated. He does not claim that the plaintiff accepted it from him under an arrangement to produce it and it was not, in fact, produced until the next fall. No other disposition was made of it until the 18th day of April, at which time he attempts to sell, assign and transfer all of the plays or dramatic works received by him from L'Arronge, including the play in question, to one George W. Hyatt. As we understand, Neuendorff's season closed on the 25th of March. He so states in his letter of January 28th to Bloch. After that time his power to act under the contract ceased. He had no further right,

Opinion of the Court, per HAIGHT, J.

power or authority to sell, assign or transfer the plays or dramatic writings of L'Arronge, or to grant permits for their production. This view does not appear to us to be in conflict with the understanding of the parties, or as they had construed and acted upon the contract during its existence. Neuendorff in making his contract with the plaintiff in 1881 mentions and describes himself as agent of the authors. The contract is to pay him royalties *as agent*, and he, *as agent* is given the right to enjoin the performances in case of non-payment. Neuendorff by his letter of January 28th, 1883, in effect concedes the right of the authors to terminate his contract at the close of the season, and up to that time it does not appear that he had ever attempted to sell, transfer or dispose of any of the plays of L'Arronge, sent to him further than to procure their performance upon the payment of a royalty in accordance with the provisions of the contract.

Neuendorff had also entered into a contract with Von Schoenthan for the production of his plays in America, similar in many respects to the L'Arronge contract, but not containing so many words and phrases usually appearing in contracts for the absolute transfer of property. The trial court held that under the Von Schoenthan contract Neuendorff was an agent merely, and consequently instructed the jury that as to the second and third counterclaims, they should be disallowed. That court, however, held that as to the L'Arronge contract, Neuendorff became the proprietor of the play of "Dollars and Sense," and therefore submitted to the jury the question of the good faith of the plaintiff in procuring the play from the author, and as to whether Neuendorff was estopped from questioning his right to produce it. Upon this issue the jury found for the plaintiff. It will not be necessary for us to further consider the Von Schoenthan contract, for, under the construction which we have given to the L'Arronge contract, it disposes of all questions pertaining to the former contract. Neither will it become necessary to consider the exceptions taken to the admission or rejection of evidence, or to the charge of the

Statement of case.

court, for under the view which we take of the L'Arronge contract neither of the counter-claims can be allowed, and the trial court could properly have directed a verdict for the plaintiff.

The judgment should be affirmed with costs.

All concur.

Judgment affirmed.

LUCY A. DUNHAM, Respondent, v. JOHN TOWNSHEND et al.,
Appellants.

118	281
132	34
118	281
159	239

In an action to recover possession of certain real estate in the city of New York, it appeared that the premises in question were part of a farm owned by B. in his lifetime. The earliest deed produced by plaintiff was one executed in 1835 to S., the grantor in which, was described as the only child and heir-at-law of B.; the truth of this recital was established by the evidence. As early as 1825 said farm was occupied by McG., a son of said grantor, who cultivated it until 1833, during which time said grantor lived at her homestead in the neighborhood and frequently visited her son at the dwelling-house on the farm, and was in constant communication with him. When his occupation ceased, the farm was rented. *Held*, that possession in said grantor was sufficiently established.

It appeared that said premises were conveyed by S. to H. On the trial plaintiff introduced in evidence a deed from the sheriff to one A., which recited the issuing of an execution against H., the seizure and sale by virtue thereof of the premises conveyed, and the redemption of the land by A., the grantee, the holder of a subsequent judgment against H. On the trial at the General Term, this deed was objected to as invalid, because the judgment on which this execution was issued was not produced and read in evidence. On the argument in this court plaintiff produced a certified copy of the judgment-roll. *Held*, that it could be properly received; and its production removed the objection to the sheriff's deed.

While the production of record evidence is never allowed in an appellate court for the purpose of reversing a judgment, it may be permitted for the purpose of sustaining one.

Plaintiff's title was objected to on the ground that the premises in question were below original high-water mark, and that the title was, therefore, in the city. The city surveyor testified that the avenue on the west side of which the lots are located, was graded between 1850 and 1853; that before that work was commenced he examined the locality, and that the land in question was then about thirteen inches below high-water mark. It appeared the city had levied an assessment on said lots for said grading, and disclaimed any ownership in itself. It also appeared that prior to

Statement of case.

1835 high-water mark was east of said avenue at that point, and that the meadows which included said lots, were above the ordinary daily tide, and were not covered by water, except during occasional and severe easterly storms. *Held*, that no title to the land was shown in the city; that the question was not as to high water mark in 1850, but as to where high-water mark was during the occupancy of McG.

Where, in an action of ejectment, the plaintiff establishes title by proper and sufficient conveyance and possession prior to the entry by defendant, and that entry is not attempted to be justified by any claim of right, the burden of establishing a better title than plaintiff's is cast upon defendant. Reported below (43 Hun, 580).

(Argued December 12, 1889; decided January 14, 1890.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made March 31, 1887, which affirmed a judgment in favor of plaintiff entered upon a verdict directed by the court.

The nature of the action and the facts are sufficiently stated in the opinion.

John Townshend for appellants. No possession was shown prior to the deed by McGowan to Sandford, nor subsequently. (*Thompson v. Burhans*, 79 N. Y. 99; *Nixon v. Walter*, 4 Cent. Rep. 875; *Price v. Brown*, 101 N. Y. 669; *Roberts v. Baumgarten*, 110 id. 384-5; *Miller v. L. I. R. R. Co.*, 71 id. 380; *Gardner v. Heart*, 1 id. 528; *Stevens v. Hanson*, 39 id. 302-304.) The sheriff's deed did not convey any title. (*Townshend v. Wesson*, 4 Duer, 342; Code Civ. Pro., § 1471; *Hart v. Coltrain*, 24 Wend. 14; *Bank of Charlestown v. Emerie*, 2 L. J. 718; *Johnson v. Whitlock*, 13 N. Y. 347; *Goldman v. Kennedy*, 17 N. Y. S. R. 433; *Phillips v. Scheffer*, 7 Lans. 350; Laws of 1834, chap. 92, § 45; *Hoyt v. Dillon*, 19 Barb. 650, 651; *Varick v. Tallman*, 2 id. 113; *Jackson v. Morse*, 10 Johns. 411; *Doughty v. Hope*, 3 Denio, 598, 1 N. Y. 79; 2 R. S. 192, § 158; *Moore v. Townshend*, 102 N. Y. 387; *Phillips v. Scheffer*, 7 Lans. 347; *Hasbrook v. Burhans*, 47 Hun, 487; *Jackson v. De Lancey*, 11 Johns. 365; 13 id. 557; *Jackson v. Catlin*, 2 id. 248; *Jackson v. Roosevelt*, 13 id. 97; *Herrick v. Morrell*, 33 N. W. Rep. 849.) The premises were below high-water mark. (*Mayor, etc., v.*

Statement of case.

Hart, 95 N. Y. 443; *Colgrove v. N. Y. & N. H. R. R. Co.*, 20 id. 494.) If Chas. Henry Hall acquired any title, then the sheriff's deed, not having been established, his title passed to his assignee upon trust to sell for the benefit of his creditors. (*Kip v. Hersch*, 103 N. Y. 565; *Florence v. Hopkins*, 46 id. 186; *Bennett v. Garlock*, 79 id. 302; *Roseboom v. Mosher*, 2 Denio, 61; *Odair v. Leatt*, 3 Hill 182, 186.) Plaintiff did not prove an ouster or a total denial of her title. (Code of Civ. Pro., § 1515; *Edwards v. Bishop*, 4 N. Y. 61; *Gilman v. Gilman*, 111 id. 265; *Parker v. Locks*, 2 Metc. 91; 87 N. Y. 353; *Edwards v. Bishop*, 4 id. 61; *Wait v. A. Ins. Co.*, 13 Hun, 371.) The deed by Hannah J. Perry and others to Lavina Dimmick and respondent was improperly received in evidence. (*Hubbell v. Moulson*, 53 N. Y. 226; *Wisner v. Ocumpaugh*, 71 id. 113; *Dawley v. Brown*, 79 id. 390.) A suitor having two remedies must elect upon which he will rely and abide by his election. (*Onderdonk v. Voorhis*, 2 Robt. 624.) The Court of Appeals is a court created by statute, and its jurisdiction is such only as the statute prescribes. (Code Civ. Pro., § 190; *Johnson v. Whitlock*, 13 N. Y. 349; *French v. Powers*, 80 id. 153.)

Abel Crook for respondent. Plaintiff's title being established, possession is presumed, and the burden of proving adverse possession was thrown upon defendants. (*Stevens v. Hauser*, 39 N. Y. 302; *Florence v. Hopkins*, 46 id. 186; *Thompson v. Burhans*, 61 id. 52; *Thompson v. Burhans*, 79 id. 99; *Carleton v. Darcey*, 90 id. 573.) The objections urged by defendants are insufficient to defeat the title of plaintiff. (3 R. S. [6th ed.], 635, § 83; *Jackson v. Roberts*, 11 Wend. 422; *Townshend v. Wesson*, 4 Duer, 342; Code, § 1471; *Phillips v. Shiffer*, 7 Lans. 347; *Burt v. Place*, 4 Wend. 591; *Ritchie v. Putnam*, 13 id. 524; *Williams v. Wood*, 14 id. 127; *Dresser v. Brooks*, 3 Barb. 429; *Bank of Charleston v. Emerick*, 2 Sandf. 718; *Jarvis v. Sewall*, 40 Barb. 449; *Robert v. Good*, 36 N. Y. 408; *Stillwell v. Carpenter*, 62 id. 639; *Porter v. Waring* 69 id. 250-255; *Day v.*

Opinion of the Court, per BROWN, J.

Town of New Lots, 107 id. 148, 157; *Wood v. Morehouse*, 45 id. 368, 379; *Phillips v. Schiffer*, 7 Lans. 347; *Laws of 1875*, chap. 545; 2 R. S. [6th ed.], 1110, § 80; *Jackson v. Cole*, 4 Cow. 587; *Hoag v. Hoag*, 35 N. Y. 490; *Kip v. Hirsh*, 103 id. 565.) There was an actual ouster of plaintiff and a total denial of her rights by defendants, who are intruders and without lawful right of possession. (*Miller v. L. I. R. R. Co.*, 71 N. Y. 380; *Price v. Brown*, 101 id. 669; *Clason v. Rankin*, 1 Duer, 341; *Child v. Chappell*, 9 N. Y. 246; *Leprell v. Kleinschmidt*, 112 id. 364; *Carlton v. Darcy*, 90 id. 573; *Jackson v. Harder*, 4 Johns. 202, 210; *Parmelee v. O., etc., R. R. Co.*, 6 N. Y. 81; *Hoag v. Hoag*, 35 id. 473.) Defendant's exceptions were properly overruled. (*Thompson v. Burhans*, 79 N. Y. 99; *Langley v. Wadsworth*, 99 id. 61; *N. J. S. Co. v. Mayor, etc.*, 109 id. 621.)

BROWN, J. This action was brought to recover the possession of an undivided one-half of five lots of land, situated on the southerly side of Ninety-ninth street in the city of New York.

The action was defended by the defendant Townshend, the other defendants being in the occupancy and possession of the land under him. Possession was demanded from these defendants before the commencement of the action and refused. Townshend did not in his answer allege any ownership in the property.

On the trial it appeared that he had taken a deed of an undivided one-sixth of the property, but it was not shown that either of his grantors had any title whatever in or to the property attempted to be conveyed. The objections now made to the judgment consist wholly in defects alleged to exist in the plaintiff's title.

The earliest conveyance produced by the plaintiff was a deed from Margaret McGowan to Edward Sandford, dated January 30th, 1835. In this deed the grantor was described as "widow of Andrew McGowan, deceased, and the only child and heir-at-law of Samson Benson, deceased." The testimony

Opinion of the Court, per BROWN, J.

showed that the original farm, which included the five lots which are the subject of this suit, was known as the "Benson" farm, and was owned by Samson Benson in his life time. Margaret McGowan was Samson's daughter and heir. She had a son Andrew, the father of Henry P. McGowan, who was a witness on the trial. As early as 1825, Andrew McGowan resided at One Hundred and Fifth street and Second avenue upon this farm. He cultivated the tillable land and used the marshes and salt meadows for pasture and to cut grass therefrom. His occupation continued until 1833, when the farm was rented out. It was sold by Margaret McGowan in 1835. During her son's occupation of this part of the farm, Mrs. McGowan lived at her homestead at McGowan's pass, now a part of Central Park. She visited her son frequently at the dwelling-house on the farm, and there was constant communication between them.

The objection is made that possession of the farm by Mrs. McGowan was not shown. We think the evidence sufficiently established possession of the land in Mrs. McGowan. The relations shown to exist between the mother and her son are entirely inconsistent with the claim that the son's possession was adverse to his mother's title, and show that he held under her and subordinate to her rights. Edward Sandford conveyed the property to Charles Henry Hall.

On the trial the plaintiff introduced in evidence a deed from Jacob Acker, "late sheriff of the city and county of New York," to Isaac Adriance. This deed recited the issuing to the sheriff of an execution out of the Superior Court of the city of New York, at the suit of the president, directors and company of the Mechanics' Bank of the city of New York, plaintiff, against Charles Henry Hall, defendant, with the usual directions to seize and sell the premises thereby conveyed; the sale thereof to one George Haus, and the redemption of the land by Isaac Adriance, the holder of a subsequent judgment against said Hall. It described and purported to convey the land in such a manner as to include the lots in controversy.

An objection strenuously urged on the trial and at the Gen-

Opinion of the Court, per BROWN, J.

eral Term against this deed as a conveyance of the title, was based on the omission of the plaintiff to produce and read in evidence the judgment on which the execution under which the sale was made was stated to have been issued. On the argument in this court the respondent produced a certified copy of the judgment-roll. The appellant objects to its reception on the ground that it is improper for this court to act upon information thus obtained. While the production of record evidence is never allowed in an appellate court for the purpose of reversing a judgment it is sometimes permitted for the purpose of sustaining a judgment. (*Stillwell v. Carpenter*, 62 N. Y. 639; *Day v. Town of New Lots*, 107 N. Y. 157.) This has frequently been decided in respect to records of judgments, exemplification of bankrupt discharges, certificates of naturalization, etc. (*Burt v. Place*, 4 Wend. 591; *Ritchie v. Putnam*, 13 id. 524; *Williams v. Wood*, 14 id. 127; *Jarvis v. Sewall*, 40 Barb. 449; *Dresser v. Brooks*, 3 id. 429.) Evidence of this character is received by the appellate court for the reason that, being in its nature incontrovertible, it would be idle to send the case back for a new trial for the sole purpose of admitting it. We think we may therefore receive and examine the judgment-roll, and, as it is regular in all respects, its production removes the objection heretofore urged to the sheriff's deed, and also the objection arising out of the general assignment of Hall for the benefit of creditors, as this assignment was of a date subsequent to the docketing of the judgment under which the sheriff's sale was made.

The next objection taken to the plaintiff's title was that the land in dispute was below original high-water mark, and the title therefore was in the city of New York. There was no substantial dispute as to the facts on this question. The only witness called by the defendant on this subject was James E. Sewell, a city surveyor. He testified that Second avenue was graded between 1850 and 1853 and that before that work was commenced, he examined the locality and that at the point where Ninety-ninth street intersected Second avenue high-water line was a little over a foot above the level of the marsh,

Opinion of the Court, per BROWN, J

and that the lots in controversy were about thirteen inches below high-water mark. He knew nothing about the locality prior to the examination of the ground preparatory to grading Second avenue.

As tending to contradict the effect of this testimony, it appeared that the city had levied an assessment on the lots in controversy for the expense of grading Second avenue and had disclaimed any ownership therein. It further appeared, without contradiction, that prior to 1835 high-water mark was east of Second avenue at Ninety-ninth street, and that the meadows which included the lots in question were above the ordinary daily tide, and were not covered by water except during occasional and severe easterly storms. Upon this testimony we do not think it was error for the court to hold that no title to the land was shown in the city. The important question was not where high-water mark was in 1850, or what effect the filling in and grading of streets over the meadows may have had on the flow of the tide, but was, rather, where ordinary high-water mark was during the occupancy of the farm by McGowan. This was shown by uncontradicted evidence to have been below the level of the lots in controversy. Title in the city could not, therefore, be predicated on the fact that the lots were originally within the line of the ordinary flow of the tides.

This view of the case renders unnecessary any reference to the deed from the city to Perry, any further than to say that it was competent to show that the city made no claim to the land in dispute, and had conveyed to Perry as a trustee for the plaintiff, for the purpose of removing any possible objection to the plaintiff's title. As the city had no title to the land, none passed to Perry by the deed, and it is of no importance in this action whether the conveyance from Perry's heirs to the plaintiff was sufficiently proven or not.

Title and possession were thus established in the plaintiff's grantors, and that title by proper and sufficient conveyances was shown to have become vested in the plaintiff. This was all prior to defendant's entry, and was sufficient to enable

Statement of case.

plaintiff to maintain ejectment against the defendant who was a mere intruder and whose entry on the lots was without a shadow of right, and threw upon him the burden of establishing a better title than that of the plaintiff. (*Carlton v. Darcy*, 90 N. Y. 566-573; *Stevens v. Hauser*, 39 N. Y. 302.)

As already stated he neither alleged or gave evidence of any title to the land. His entry was wrongful and his occupancy that of a trespasser.

There was ample evidence of actual ouster of the plaintiff and a denial of her rights by the defendant.

We find no error in the record of the trial and the judgment should be affirmed with costs.

All concur.

Judgment affirmed.

THE NEW YORK LAND IMPROVEMENT COMPANY, Appellant,
v. WILLIAM S. CHAPMAN, Respondent.

In an action to recover damages for an alleged fraud the complaint set forth in substance that defendant was a member of a firm to whom plaintiff had rented certain premises under a lease, which permitted it, on default in payment of the rent, to enter and dispossess the lessees and to demise the premises to others; that the lessees failed to pay rent due; that plaintiff had an opportunity to lease the premises to a responsible party, and that it was induced by representations made by defendant, which were to his knowledge false, to allow the lessees to remain in possession, to refrain from re-entering and to refuse to lease to such other persons, and in consequence, the lessees being insolvent, plaintiff lost the rent. The complaint was dismissed upon the pleadings. *Held*, error; that the allegations of the complaint were sufficient to justify the conclusion that, but for the representations complained of, plaintiff would have availed itself of its right to re-enter, and that subsequent occupation by the lessees and the additional obligation to pay rent thereafter accruing, was permitted on the faith of the false representations.

Wemple v. Hillbreth (10 Daly, 481), distinguished.

The question of intention is involved in all cases of fraud, founded upon alleged false representations, in so far that the maintenance of the action is dependent upon the influence of the deceit upon the party claiming to have been damaged; his purpose must have been governed by the deceit, to his prejudice to afford a remedy.

Statement of case.

The complaint also alleged that on the first of January, after the commencement of the term, the lessees sublet the premises and that plaintiff accepted from them the tenancy so created for the residue of the term. *Held*, that by taking the benefit of the subtenancy plaintiff relinquished whatever claim it might otherwise have had against the lessees accruing thereafter; but it did not relieve defendant from any damages plaintiff had sustained before that date by reason of the alleged fraud.

The doctrine that any act in affirmance of a contract, after discovery of fraud, defeats the right of rescission is not necessarily applicable to an action for damages founded on the fraud.

The complaint also alleged that in an action upon the lease plaintiff had recovered a judgment against the lessees for the unpaid rent, and that an execution issued thereon was returned unsatisfied. *Held*, that such recovery did not relieve defendant from liability upon the charge of fraud, as such liability was his only, distinct from and collateral to that of the firm, and the remedy against him was concurrent with that against the firm.

It is essential to the maintenance of an action for fraud to show that damages resulted from it as the proximate cause, but it is not necessary to show that the person guilty of the fraud derived any benefit from it. *N. Y. L. I. Co. v. Chapman* (22 J. S. 297), reversed.

(Argued December 18, 1889; decided January 14, 1890.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made March 15, 1887, which affirmed a judgment in favor of defendant, directed by the court at the trial.

This was an action to recover damages for an alleged fraud.

The complaint alleged that plaintiff, being the owner of certain premises in the city of New York, rented them to the firm of Groot & Chapman, composed of the defendant and two other persons named, for the term of one year from May 1, 1882, at the rent of \$4,500, payable quarterly, and, in addition, twelve dollars monthly, janitor's fees; that, by the terms of the lease, the plaintiff, on default in payment of rent, should have the right to enter and take possession of the premises; also to dispossess the lessees as provided by the statute, and to demise them to others; that on August 1, 1882, there became due \$1,125, and some amount of janitor's fees, and that thereafter in that month the defendant, to induce the

Statement of case.

plaintiff not to re-enter and take possession of the premises and allow the lessees to remain in possession, falsely and fraudulently represented to the plaintiff that they were entirely solvent and amply able to pay the rent, that they had not failed in business, that they owed no debts, that the only reason they were not able to pay the rent was that in legal proceedings for the winding up and settlement of the estate of a deceased person, who formerly had an interest in their firm, an injunction had been obtained and served against their bank account, and thus they were prevented from drawing a check for the rent, which was the only reason why they did not pay it. The plaintiff further alleged that he could then have rented the premises to responsible persons for the remainder of such term, at a rent as large as that reserved by the lease, and had applications at that time for a lease of the premises, and so informed the defendant, and that the defendant, for the purpose before mentioned, on several occasions repeated such representations to the plaintiff, that they were false, and made with the fraudulent design of deceiving the plaintiff, and that he believed such statements to be true, relied upon them, and as the consequence allowed the lessees to remain in possession, refrained from re-entering and dispossessing them, and refused to lease to such other parties; and alleged that the statements so made by the defendant were false, and by him known to be so, and then proceeded to negative such representations by allegations that the lessees then owed a large amount of debts, had but a small amount of assets, and were hopelessly insolvent; that they had virtually suspended payment in June, 1882, and that no injunction had been obtained against their bank account. He also alleged that the lessee sub-let the premises on January 1, 1883, to other parties, who from that time until the end of the term paid rent to the plaintiff; and that the plaintiff in an action against the lessees upon the lease recovered a judgment against them for the unpaid rent and janitor's fees amounting to \$3,072, and interest, upon which execution was issued and returned unsatisfied, and that they declare that they have no property.

Statement of case.

The defendant, by his answer, put in issue the allegation of fraud and of the alleged opportunity or ability of the plaintiff to rent the premises to other parties for the residue of the term. When the action came on to trial the court dismissed the complaint upon the pleadings.

F. K. Pendleton for appellant. On a motion to dismiss, the complaint must be taken as true. Every inference and intendment is to be made in plaintiff's favor. (*Snide v. Bense*, 22 Hun, 601; *Sheridan v. B. C. & N. R. R. Co.*, 36 N. Y. 39.) A non-suit cannot be granted if plaintiff is entitled to even nominal damages. (*Van Rensselaer v. Jewett*, 2 N. Y. 135.) That defendant made the false representations knowingly and wilfully and with intent to deceive, is admitted on this motion. The law does not favor immunity in such cases. (*Rice v. Manly*, 66 N. Y. 82; *White v. Merritt*, 7 id. 352.) The fact that judgment has been recovered against defendant's firm for the rent, is no bar to this action. (*Goldberg v. Dougherty*, 7 J. & S. 189; *Morgan v. Skidmore*, 55 Barb. 263; 3 Abb. [N. C.] 102.)

Hector M. Hitchings for respondent. The complaint does not contain the necessary elements of an action for false representations and deceit or state sufficient facts to constitute such a cause of action. (*Chester v. Comstock*, 40 N. Y. 575; 2 Addison on Torts, §§ 1004, 1174; *Starr v. Bennett*, 5 Hill, 303; *Smith v. Countryman*, 30 N. Y. 655, 681; *Long v. Warren*, 68 id. 426, 431; *Kimball v. Bangs*, 3 N. E. Rep. 891; 1 Addison on Torts, 1; *Wemple v. Hildreth*, 10 Daly, 481; *Bradley v. Fuller*, 118 Mass. 239; *Masterson v. Mayor, etc.*, 7 Hill, 62; *White v. Miller*, 71 N. Y. 118, 133; *Austin v. Parsons*, 41 Conn. 282; *Lamb v. Stone*, 11 Pick. 527; *Waring v. Somborn*, 82 N. Y. 604; *Bennett v. Bates*, 84 id. 373.) Long before the bringing of this action the plaintiff waived any tort on the part of the defendant. (1 Addison on Torts, 44, § 52; *Brewer v. Sparrow*, 7 B. & C. 310; McAdam on Land. & Ten. 131, 132; *Strong v. Strong*, 102 N. Y. 69, 73; *S.*

Opinion of the Court, per BRADLEY, J.

R. R. Co. v. Row, 24 Wend. 74; *Bruce v. Davenport*, 3 Keyes, 472; *People v. Stevens*, 71 N. Y. 559.) The plaintiff, by the election of another, different and inconsistent remedy is estopped from pursuing this. (*Hanover Co. v. Sheldon*, 9 Abb. Pr. 420; *Morgan v. Skidmore*, 3 Abb. [N. C.] 92; *Rodemund v. Clark*, 46 N. Y. 357; *Bank of Beloit v. Beale*, 34 id. 473; *Morris v. Rexford*, 18 id. 553; *Kennedy v. Thorp*, 51 id. 174; *Bowen v. Mandeville*, 95 id. 241; *Strong v. Strong*, 102 id. 69; *Fowler v. S. B'k*, 113 id. 450; 23 Abb. [N. C.], 133; *Scarf v. Jardine*, L. R. [7 App. Cas.] 345; *Gardner v. Ogden*, 22 N. Y. 327; *Terry v. Munger*, 49 Hun, 560.)

BRADLEY, J. The action was founded on alleged fraud, for which the plaintiff sought to recover damages. And the question presented is whether the complaint stated facts sufficient to constitute a cause of action. The view of the court below was that it did not, and *Wemple v. Hildrith*, (10 Daly, 481) was cited in support of such conclusion. In that case the alleged representations relied upon, as fraudulent, related to the pecuniary condition of the debtor, which induced the plaintiff to extend the term of credit for goods by him before then sold and delivered. It was not there alleged that the plaintiff parted with anything or that any purpose, which he then had or was proceeding to execute, was relinquished. The action was founded upon false representations which induced a mere extension of credit. And the court held that there was not the requisite certainty of any injury to the plaintiff in consequence of the representations, to furnish any basis for the estimate or recovery of damages. It is essential to the maintenance of an action for fraud that damages result from it as the proximate cause, but it is not necessary that the party guilty of the deceit derive any benefit from it. (*Upton v. Vail*, 6 John. 181; *Hubbard v. Briggs*, 31 N. Y. 518.)

In the present case the allegations of the complaint are to the effect, that the plaintiff by reason of the default of the lessees, had the purpose to terminate their tenancy by taking

Opinion of the Court, per BRADLEY, J.,

possession of the demised premises pursuant to the right to do so, and to avail itself of the opportunity, which it had, to rent them to other and solvent persons, and was induced by the fraudulent representations of the defendant to relinquish such purpose and to refuse to rent the premises to such other parties. This case is essentially distinguishable from that of *Wemple v. Hildrith*. Here, as it is alleged, there was not only an extension of credit for rent then due, but by permitting the lessees to remain in possession, credit was given to them for rent thereafter to issue out of the term. Thus they were allowed to incur liability to the plaintiff for the further use of the premises. In view of the allegations of the complaint, it must here be assumed that the subsequent occupation of the premises out of which arose the additional obligation of the lessees to pay rent, was permitted on the faith of the false representation of the defendant; and to that extent and by that means credit in their behalf was obtained. It is however urged that the exercise of the right of the plaintiff to take possession of the premises and rent them to others, rested solely in intention, which may or may not have been executed, and whether any damages resulted from the alleged fraud was uncertain and speculative, and, therefore, that on the facts alleged there is nothing to warrant a recovery. It is true that the plaintiff had taken no steps to dispossess the lessees, and relinquished nothing in that respect other than a purpose to do so, but the fact upon which the right to recover depends is that, if the representations had not been made, the plaintiff would have executed such purpose, and rented the premises to others who were solvent, and thus have realized something in place of the worthless liability of the lessees which arose from the occupation of the premises by them subsequently to the time the representations were made, which induced the plaintiff to refrain from exercising such right. The question of intention is involved in all cases of fraud founded upon alleged false representations in so far, that the maintenance of an action is dependent upon the influence of the deceit upon the party claiming to have been damnified. The representations known

Opinion of the Court, per BRADLEY, J.

to be false in relation to the pecuniary condition of the party seeking credit, furnish no ground for action unless the person from whom it is sought is influenced by them in giving the desired credit. His purpose must have been governed by the deceit to his prejudice to afford a remedy in fraud. The right to deny credit, notwithstanding the representations or the reason to suppose that it would not have been denied if they had not been made to the plaintiff, presents a question no different, in legal effect, for the purpose of such remedy, than that which might arise in case of the sale of goods upon the faith of alleged fraudulent statements relating to the means and ability of the purchaser to pay.

In the case last supposed a contract of sale would be the product of the fraud, while here there was no new contract resulting from it. But the right of action for such cause does not rest in contract, but depends only upon the fact that an injury has been suffered resulting in damages to the party seeking redress, and that such damages are the legitimate consequence of the fraud. In *Benton v. Pratt*, (2 Wend. 385) a party who by agreement, within the statute of frauds and void, had promised to purchase plaintiff's hogs, was induced by the false representations of the defendants not to take them. A recovery for the alleged fraud was supported. And the court held that it was not material whether the contract for the sale of the hogs was binding or not, as it appeared that they would have been delivered and taken upon the promise to purchase but for the fraudulent representations of the defendants.

And in *Rice v. Manley* (66 N. Y. 82) the same principle was applied to support an action for fraud founded upon the false representation of defendant that the plaintiff did not want the cheese which the latter, by a like invalid agreement, had promised to purchase of a third party, who was induced by such representation to sell the cheese to defendant. In both those cases the performance of the void agreements to deliver and purchase the property rested in intention of the parties to them, supported by no legal right; yet, the court held that the fact whether the promise to sell and purchase would have been

Opinion of the Court, per BRADLEY, J.

performed if the defendants had not intervened and by their false representations defeated such performance, was properly the subject of inquiry; and that the determination of that question of fact in the affirmative gave support to the actions and established the right to recover such damages as resulted to the plaintiffs from the defeated performance. In the present case the plaintiff, having, as alleged, the right to the possession of the premises and the opportunity to lease them to others able to pay the rent, was induced by the false representations of the defendant, who knew them to be false, to allow the lessees to remain in possession, refrain from re-entering and to refuse to lease the premises to such other persons. The allegations of the complaint were such as to permit evidence of a state of facts to justify the conclusion that but for the representations complained of, the plaintiff would have availed itself of such right and opportunity. And the damages resulting from the facts so established would be measured by the loss sustained, not exceeding the amount of the liability of the defendants, which subsequently accrued upon the lease. The difficulty suggested of establishing the facts essential to a recovery may have more relation to the evidence than it seems to have in its bearing upon the allegations of the complaint. The latter only have consideration on this review.

It seems that on the first of January, after the commencement of the term, the lessees sub-let the premises, and that the plaintiff accepted from them the tenancy so created for the residue of the term. This, it is urged, was a waiver of the alleged fraud and its consequences. By taking the benefit of the subtenancy the plaintiff relinquished whatever claim it may otherwise have had against the lessees accruing from and after the first of January, but it did not have the effect to relieve the defendant from any damages which the plaintiff had before then sustained by reason of the alleged fraud. The doctrine that any act in affirmance of a contract, after discovery of fraud, defeats the right of rescission is not necessarily applicable to an action for damages founded in fraud. (*Gould v. Cayuga Co. Nat. Bank*, 99 N. Y. 333.) It is also contended

Opinion of the Court, per BRADLEY, J.

that the action and recovery by the plaintiff against the lessees of the amount of the rent for the time they remained in possession of the premises, was an election of remedy, within the doctrine upon the subject, which denied to the plaintiff any right of action against the defendant for the alleged fraud.

Such may have been the effect of that recovery if all the lessees had been chargeable with such fraud, as in that case their liability would have been merged in the judgment, embracing as it did the entire amount of rent for which they became liable upon the lease. The defendant was necessarily a party to the action upon the lease, which was made by the firm of which he was a member. The liability of the lessees was joint. But the liability of the defendant for the alleged fraud was his only, and collateral to that of the firm. The remedy against him for the fraud, was not inconsistent with that against the firm as both remedies proceed in affirmance of the lease; and because the remedy furnished by the fraud is against the defendant alone and collateral to that upon the undertaking of the lessees jointly, it was not merged in the recovery against the latter. (*Morgan v. Skidmore*, 3 Abb. [N. C.] 92; affirming 55 Barb. 263; *Bowen v. Mandeville*, 95 N. Y. 237, 240.)

The defendant being a necessary party to the former action by which the plaintiff was enabled to charge the firm, was not by the recovery had upon the lease relieved from liability upon the charge of fraud. That liability of the defendant was his, severally, and distinct from that of the firm, and the remedy was concurrent with that against it.

No other question requires consideration.

The judgment should be reversed and a new trial granted, costs to abide the event.

All concur.

Judgment reversed.

Statement of case.

ELIZABETH D. VAIL, Respondent, v. WILLIAM M. REYNOLDS,
Appellant.

118	297
123	556

118	297
127	562

118	297
132	56
132	196

118	297
151	284

Plaintiff brought an action to recover damages sustained through alleged fraudulent representations of defendant, inducing the purchase by her of certain stock. Plaintiff's evidence tended to show that the stock was worthless, and it was tendered back on the trial; one of the defendant's witnesses however testified to facts showing that it had some value. The trial judge after instructing the jury as to the particular facts necessary to establish defendant's liability, further instructed them, that if such facts were established to their satisfaction, plaintiff was entitled to a verdict for the amount paid by her for the stock to which the jury might add interest "by way of damages." Defendant's counsel excepted in these words: "I except to the instruction, that if the plaintiff is entitled to recover, she is entitled to recover the amount paid by her on the purchase of the stock whether that purchase be intended to include or exclude interest." *Held*, that the charge was erroneous, and that defendant's exception thereto was sufficient; that it was not necessary to specifically request the court to reconsider its decision and submit the question of damages to the jury; that plaintiff was entitled to recover the difference between the value of the stock as it was, and the value as it would have been had the representations been true; and that the question as to the actual value of the stock was one, which in the absence of any waiver, defendant was entitled to have determined by the jury.

Also, that defendant's liability was not effected by the tender on trial, as the action was not one which permitted plaintiff to return the stock.

It seems, a person induced, by fraudulent representations, to purchase property has three remedies. He may, upon discovery of the fraud, rescind the contract absolutely and sue in an action at law to recover the consideration parted with upon the fraudulent contract; but he must first restore, or offer to restore, to the party sued, whatever he has received by virtue of the contract. He may bring an action in equity to rescind the contract and as such action is not founded upon a rescission, but to obtain one, it is sufficient for the plaintiff to offer in his complaint to return what he has received and make a tender of it on the trial. He may retain what he has received and bring an action at law to recover the damages sustained, the measure of which is the difference between the value of the article sold and what it should be if as represented.

It is competent for an appellate court, on appeal from a judgment, when an error on the trial does not involve the right of recovery, but simply the amount, and the effect thereof can be clearly and definitely determined on the evidence before it, to permit the respondent to consent that

Statement of case.

the judgment may be corrected by deducting therefrom the amount erroneously included and to affirm the judgment as modified.

This rule applies to actions of torts, as well as to actions on contract.

Vail v. Reynolds, (42 Hun, 647), reversed

(Argued December 16, 1889; decided January 14, 1890.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made December 31, 1886, which affirmed a judgment in favor of plaintiff, entered upon a verdict and affirmed an order denying a motion for a new trial.

The nature of the action and the facts are sufficiently stated in the opinion.

Wm. B. Hornblower and *J. Tredwell Richards* for appellant. In an action to recover damages for deceit in the sale of property, the false representations must be material to the pecuniary value of the property. They must be of such nature that their truth or falsity would affect the intrinsic character and value of the property itself. (*Bennett v. Terrill*, 20 Ga. 83, 86; *Upton v. Vail*, 6 Johns. 181, 183; *Nye v. Merriam*, 35 Vt. 438, 443; *Castleman v. Griffen*, 13 Wis. 537; *Taylor v. Scoville*, 54 Barb. 34; *Yockman v. Chapin*, 19 J. & S. 17.) There is no evidence to show that any of the material representations, alleged to have been made by defendant, were untrue. (*Whiteside v. Hyman*, 10 Hun, 218.) The present action cannot be maintained as an action at law upon a rescission to recover back the consideration paid. (*Gould v. C. Nat. Bk.*, 86 N. Y. 75.) The court instructed the jury that if they found for the plaintiff, she was entitled to the full amount of consideration, paid by her for the stock, with interest, less amount received by her from resales of the stock; this was error, (*Krumm v. Beach*, 96 N. Y. 406; *Grissler v. Powers*, 81 id. 57; *Graves v. Spier*, 58 Barb. 349, 387; *Coles v. Watson*, 14 Hun, 41, 45; *Rawley v. Woodruff*, 2 Lans. 416; *Muller v. Eno*, 14 N. Y. 597; *Whitney v. Allaire*, 1 id. 305; *Hubbell v. Meigs*, 50 id. 481; *Wyeth v. Morris*, 13 Hun, 338.) But not only was the rule of damages prescribed to the jury erroneous in itself, but it was highly prejudicial in its practical operation and effect.

Opinion of the Court, per BROWN, J.

(*Green v. White*, 37 N. Y. 407.) The learned trial judge did not have a right to proceed, as he actually did, upon the hypothesis that the stock held by the plaintiff was worthless. (*People ex rel. v. Jones*, 17 N. Y. S. R. 585, 592.) The burden of proof was upon the plaintiff to show that the stock was worthless at the time the sale was made. (*Murray v. Stanton*, 99 Mass. 345; *Masterson v. Mayor, etc.*, 7 Hill, 61; *Masterson v. Boyce*, 29 Hun, 456; *Stone v. Power*, 47 N. Y. 568, 569; *Requa v. Holmes*, 16 id. 202; *Goldmans v. Abrahams*, 9 Dely, 223; *Schenk v. Andrews*, 57 N. Y. 133; *Freund v. Paten*, 10 Abb. [N. C.] 311; *Allis v. Leonard*, 58 N. Y. 291.) It is only where the party excepting has done some affirmative act to deprive himself of the right to his exception, or to render it immaterial that it becomes necessary in order to reinstate himself to call attention to the correct rule of law, or to claim the benefit of the precise right apparently waived. (*Winchell v. Hicks*, 18 N. Y. 565; *O'Neil v. James*, 43 id. 84; *F. Nat. Bk. v. Dana*, 79 id. 116; *Trustees, etc. v. Kirk*, 68 id. 459; *Stone v. Potter*, 47 id. 568, 569.)

Wm. W. Goodrich for respondent. Exceptions were taken to the proof of contemporaneous frauds of the defendant in the sale of stock to other persons. Such evidence is admissible to show intent. (*Cary v. Houghtaling*, 1 Hill, 311; *Hall v. Naylor*, 18 N. Y. 588; *Miller v. Barber*, 66 id. 558.)

BROWN, J. The plaintiff sued the defendant to recover damages sustained by fraudulent representations inducing the purchase of stock of the Cisco Consolidated Gold Mining Company and had a judgment in her favor, which has been affirmed at the General Term.

We think there was ample testimony to justify the submission of the case to the jury, and the exception to the denial of the motion to dismiss the complaint need not be further alluded to.

The principal question on this appeal arises upon an exception to the charge upon the measure of damages.

The learned trial judge very fully and carefully instructed the jury as to the particular facts necessary to be proven to

Opinion of the Court, per BROWN, J.

establish the defendant's liability, and further instructed them that if such facts were established to their satisfaction that the plaintiff was entitled to a verdict for the amount of money which she had paid out for the stock in question, which sum was stated to the jury to be \$18,000, to which the jury was permitted to add interest "by way of damages."

The counsel for the defendant excepted to this instruction as follows: "I except to the instruction that if the plaintiff is entitled to recover she is entitled to recover the amount paid by her on the purchase of the stock whether that purchase be intended to include or exclude interest."

It is claimed by the respondent that this exception was not sufficient to bring up for review the ruling of the court on the measure of damages for the reason that it was based on the assumption of the fact that the stock was worthless, and that if the appellant had desired to have the question of its value submitted to the jury he should have made a specific request to that effect.

The rule invoked by the respondent is of frequent application when a party by a motion for a non-suit or for a direction of a verdict, assumes certain facts to be undisputed, and rests his case on propositions of law, and thus impliedly waives his right to go to the jury. (*Winchell v. Hicks*, 18 N. Y. 558; *O'Neill v. James*, 43 id. 84.) But we think it has no application to the case at bar.

The defendant had assumed no position in the case and had done no act from which the court could have assumed that he waived his right to have all the disputed facts in the case submitted to the jury, and if the court erroneously assumed that the facts as to the value of the stock were not in dispute, and laid down a rule for the guidance of the jury, based upon such erroneous view of the evidence, the question of error is presented under the general exception to that part of the charge, and it was not necessary to particularly request the judge to reconsider his decision, and submit the question of value to the jury.

In effect the charge was a direction of a verdict for the

Opinion of the Court, per BROWN, J.

amount paid for the stock, provided the jury found the facts necessary to create liability, and the rule is now well established that when the court directs a verdict, an exception to the ruling of the judge, in the absence of anything from which it may be implied that the right to go to the jury has been waived, is sufficient to present the objection on appeal that there were questions of fact for the jury, and it is not necessary to request that every fact be so submitted. (*Trustees of East Hampton v. Kirk*, 68 N. Y. 459; *First Nat. Bank v. Dana*, 79 id. 108, 110; *Stone v. Flower*, 47 id. 566.)

The only thing that occurred during the trial that it is claimed amounted to a waiver of all questions of fact relating to the value of the stock, was a conversation between the counsel for the parties at the close of the plaintiff's case. This amounted to no more than an inquiry by defendant's counsel as to the amount claimed by the plaintiff and a reply giving the amount in substantially the language of the complaint. There was certainly nothing in this to create the impression that the defendant agreed to the amount named, and the court did not adopt it in the charge to the jury, as it materially reduced the figures then named, and it was followed by proof on defendant's part to the effect that the stock had some value.

We think the exception to the charge was well taken. The action was plainly one for deceit, and the measure of damages in cases of that character is full indemnity for the loss sustained.

The representations inducing the purchase being false in fact, must be made good in their pecuniary consequences. Accordingly the party defrauded is entitled to be made pecuniarily as well off as if the representations had been true, and this is accomplished by allowing to him, as damages, a sum of money equal to the difference between the value of the property as it was in fact and the value as it would have been if the representations had been true. (*Krumm v. Beach*, 96 N. Y. 398, 406; *Whitney v. Allaire*, 1 id. 305.)

While not denying that the rule laid down by the trial court in its general application to cases of deceit was erroneous, the respondent claims it was correct in this case for the reason,

Opinion of the Court, per BROWN, J.

first, that the stock was shown to be worthless and, *second*, it was offered back to the defendant on the trial.

There was evidence given on the part of the plaintiff which tended to show that the stock had no value and which if it had been uncontradicted would have justified that conclusion, but Vanderwater Smith, a witness called by the defendant, testified to a personal examination of the mine, and stated that, in his opinion, founded upon such examination, the property was worth \$200,000, and that after his examination he purchased some of the stock of the company paying therefor two dollars per share.

We think the defendant was entitled to have the jury consider this evidence and if it had been believed it would have permitted the conclusion that the stock had a value equal to two dollars per share.

The action was not one which permitted the plaintiff to return the stock to the defendant, and the tender thereof on the trial, was not an act appropriate to any purpose material to the plaintiff's case and had no effect on the extent of the defendant's liability.

A person who has been induced by fraudulent representations to become the purchaser of property, has upon discovery of the fraud three remedies open to him, either of which he may elect. He may rescind the contract absolutely and sue in an action at law to recover the consideration parted with upon the fraudulent contract. To maintain such action he must first restore, or offer to restore, to the other party whatever may have been received by him by virtue of the contract. (*Gould v. Cayuga County Nat. Bank*, 86 N. Y. 75; *Thayer v. Turner*, 8 Met. 550; *Evans v. Gale*, 17 N. H. 573.)

He may bring an action in equity to rescind the contract and in that action have full relief, (*Allerton v. Allerton*, 50 N. Y. 670.) Such an action is not founded upon a rescission, but is maintained *for* a rescission, and it is sufficient therefore for the plaintiff to offer in his complaint to return what he has received and make tender of it on the trial. Lastly, he may retain what he has received and bring an action at law to recover the

damages sustained. This action of the contract and the recovery is the difference between it should be according to the *Beach, supra.*)

As already stated this action equitable case was made by the relief sought. The contract had judgment asked for was for damages therefore, under the case made by the plaintiff to restore the stock to the defendant effect on the measure of the plaintiff.

The charge of the court the error, however, was not one which every but affected solely the amount.

Under the facts as they appear in the case one in which the defendant new trial, but the plaintiff must consenting to a reduction of the of the error of the charge.

While this court cannot reduce that the damages are excessive jury and determine the damages definite or uncertain, it is undoubtedly appellate court, when the effect of right of recovery can be clearly shown the evidence before it, to permit the judgment be corrected by deducting erroneously included therein. (528.) And this rule applies to actions on contract.

In this case the utmost that can be shown by the plaintiff's testimony as to the value of the stock was worth two dollars per share.

It would have been optional with the plaintiff if they should give the evidence as to the value of the stock as two dollars per share they could not give

Statement of case.

The effect of the erroneous ruling of the court, therefore, was to deprive the defendant of a possible deduction of that amount from the sum paid for the stocks.

The plaintiff purchased in all 1,250 shares of stock as follows: In February, 1880, 600 shares; in March, 1880, 250 shares; in January, 1882, 200 shares; in April, 1882, 200 shares.

There was sold out of the first two lots 400 shares, and the proceeds of such sale were applied in reduction of the defendant's liability, leaving in her possession at the commencement of the action 850 shares.

A reduction from the amount of the judgment of \$1,700, with interest on \$900 from February 1, 1880; on \$400 from January 1, 1882, and on the balance from April 1, 1882, affords to the defendant all the benefit he could have had from a consideration of his evidence as to the value of the stock by the jury.

The plaintiff may, within twenty days, stipulate to reduce the judgment in the sum indicated, and if such stipulation is filed the judgment so reduced will be affirmed without costs in this court to either party, but if not filed the judgment should be reversed and a new trial granted, with costs to abide the event.

All concur.

Judgment accordingly.

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SARAH URANSKY, Respondent, v. THE DRY DOCK, EAST BROADWAY AND BATTERY RAILROAD COMPANY, Appellant.

In an action to recover damages for injuries sustained by plaintiff, a married woman, alleged to have been caused by defendant's negligence, the complaint contained no averment showing that she was for any reason entitled to the fruits of her labor, or that she was engaged in business on her own account and by reason of her injuries has suffered loss therein. Plaintiff was permitted to prove on trial, under objection and exception, that she was engaged in business from which she received a certain amount per month and that because of her injuries she was prevented from working two months. *Held*, error.

Statement of case.

Presumptively, damages for negligently diminishing the earning capacity of a married woman belong to her husband, and when she seeks to recover such damages, her complaint must allege that for some reason she is entitled to the fruits of her own labor, or, if she seeks to recover damages for an injury to her business, she must allege that she was engaged in business on her own account and by reason of the injury was injured therein as specifically set forth—

Hartel v. Holland, (19 Wkly. Dig. 312), *Ehrgott v. Mayor, etc.* (96 N. Y. 275), distinguished.

Uransky v. D. D., etc., R. R. Co. (44 Hun, 119), reversed.

(Argued December 16, 1889; decided January 14, 1890.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made March 31, 1887, which affirmed a judgment in favor of the plaintiff entered upon a verdict.

The nature of the action and material facts are stated in the opinion.

John M. Scribner for appellant. The plaintiff should have been non-suited. (*Suydam v. G. S., etc., R. R. Co.* 41 Barb. 375; *Spaulding v. Jarvis*, 32 Hun, 621; *Barker v. H. R. R. Co.*, 4 Daly, 274; *Fleckenstein v. D. D. R. R. Co.*, 105 N. Y. 655; *Donnelly v. B. C. R. R. Co.*, 109 id. 21.) The court erred in allowing the plaintiff to give evidence in regard to her earnings in business as a dressmaker. (*Filer v. N. Y. C. R. R. Co.*, 49 N. Y. 56; *Malony v. Dows*, 15 How. Pr. 265; 2 Sedwick on Dam. [7th ed.] 608; *Schmitt v. D. D. R. R. Co.*, 3 N. Y. S. R. 257; *Saffer v. D. D. R. R. Co.*, 24 N. Y. S. R. 210; *Gumb v. T. T. St. R. R. Co.*, 114 N. Y. 411.) The court erred in allowing the plaintiff to prove the declarations of Dr. Messemmer, the physician, who was called by the plaintiff as a substitute for Dr. Nichols. (*Hutchings v. Hutchings*, 98 N. Y. 65; *Anderson v. R. W. & O. R. R. Co.*, 54 id. 334; *Sherman v. D., L. & W. R. R. Co.*, 106 id. 542; *Sherman v. D., L. & W. R. R. Co.*, 106 N. Y. 546; *Luby v. Hudson R. R. Co.*, 17 id. 131; *Whittaker v. E. A. R. R. Co.*, 51 id. 295; *Furst v. S. A. R. R. Co.*, 72 id. 544; *White v. Miller*, 71 id. 118; *Waldele v. N. Y. C. R. R. Co.*,

Statement of case.

95 id. 274; *Flynn v. N. Y. E. R. R. Co.*, 17 J. & S. 60; *Pfeffele v. S. A. R. R. Co.*, 19 Wkly. Dig. 44; *Clarke v. Anderson*, 15 N. Y. S. R. 363; *Reed v. N. Y. C. R. R. Co.*, 45 N. Y. 574-578; *Sherman v. D. L. & W. R. R. Co.*, 106 N. Y. 546; Code, §§ 834, 836; *White v. Miller*, 71 N. Y. 118.) The court erred in allowing the plaintiff's declarations to Mrs. Fielder when she visited the plaintiff. (*Caldwell v. Murphy*, 11 N. Y. 416; *Werely v. Persons*, 28 id. 344; *Reed v. N. Y. C. R. R. Co.*, 45 id. 574-579; *Furst v. S. A. R. R. Co.*, 72 id. 546; *Roche v. B. C. & N. R. R. Co.*, 105 id. 294; *Olp v. Gardner*, 48 Hun, 169; *Mosher v. Russell*, 44 id. 12.) The declarations of the plaintiff in regard to the alleged pain she suffered were incompetent. (*Roche v. B. C. R. R. Co.*, 105 N. Y. 294; *Olp v. Gardner*, 48 Hun, 169.) It was incompetent to prove the usual speed of street cars in Canal street. (*Saffer v. D. D. R. R. Co.*, 24 N. Y. S. R. 210.) It was error to draw inferences from the evidence of other witnesses. (*Guterman v. L. S. S. Co.*, 83 N. Y. 365.) The confidence expressed by Justice BRADY in the results of jury trials is scarcely justified by experience or authority. *Haring v. N. Y. & E. R. R. Co.*, 13 Barb. 15; *Suydam v. G. S. R. R. Co.*, 41 id. 380; *Mackey v. N. Y. C. R. R. Co.* 27 id. 541; *Toomey v. Railway Co.*, 3 C. B. [N. S.], 146.

Louis Z. Kinstler for respondent. The motions to dismiss the complaint were properly denied. (*Hill v. N. A. R. R. Co.*, 109 N. Y. 342; *Edgerton v. N. Y. & H. R. R. Co.*, 39 id. 230; *Caldwell v. N. Y. S. Co.* 47 id. 291; *Mullen v. St. John*, 57 id. 567; *Seybolt v. N. Y. L. E. & W. R. R. Co.* 95 id. 568; *Coddington v. B. C. R. R. Co.*, 102 id. 67; *Etherington v. P. P. & C. I. R. R. Co.*, 88 id. 641; *Barker v. Savage*, 45 id. 194; *Wendell v. N. Y. C. & H. R. R. R. Co.*, 91 id. 427; *Massoth v. D. & H. C. Co.*, 64 id. 529; *Payne v. T. & B. R. R. Co.*, 83 N. Y. 574; *Wolfkill v. S. A. R. R. Co.*, 38 id. 49; *Willis v. L. I. R. R. Co.*, 34 id. 679; *Hart v. H. R. B. Co.*, 84 id. 56; *Stackus v. N. Y. C. & H. R. R. R. Co.*, 79 id. 464; *Clark v. E. A. R. R. Co.*,

36 id. 137, 138; *Barrett v. Coddington v. B. C. R. R. Co* 22 Wkly. Dig. 156; *Dygert v. han v. N. Y. C. & H. R. R.* The questions calling for statement of witnesses were competent. *& W. R. R. Co.*, 102 N. Y. 1 Cent. Rep. 779; *Finklestien v. Wkly Dig. 325*; *Barrett v. T. Salter v. U. & B. R. R. R.* had a right to recover for her inability to work or to follow her. *Holland*, 19 Wkly. Dig. 312; N. Y. 275.) Where there is evidence of exclamations and complaints of lay witnesses are admissible. (*R. Co.*, 99 N. Y. 138; *Kennedy* N. Y. Supl. 223; *Lewke v. D. R.* It was clearly proper to ask a medical man the health of the plaintiff such as to, would have, and further, whether in a delicate or pregnant condition person otherwise robust. (*Tice* is competent for a physician to give present condition of plaintiff rest other causes. (*Turner v. City of* 309; *Jones v. U. & B. R. R. R. son v. N. Y. C. & H. R. R. R. v. Beader*, 23 Wkly. Dig. 374; 51; *People v. Beach*, 87 id. 512 day life lay witnesses are competent. (*Hallahan v. N. Y., L. E. & R.* 199; *Blake v. People*, 73 N. Y. Cent. Rep. 779.) The question of communications between a physician properly excluded. (Code of *M. G. L. Co.*, 90 N. Y. 29; *Ku*

Opinion of the Court, per PARKER, J.

Co., 56 id. 538.) The defendant's motion to set aside the verdict and for a new trial was properly denied. (*Archer v. N. Y., N. H. & H. R. R. Co.*, 106 N. Y. 602; *Harvey v. N. Y., W. & R. R. Co.*, 23 Wkly. Dig. 200; *Sherwood v. Hauser*, 94 N. Y. 627.)

PARKER, J. The recovery had was for damages sustained by the plaintiff, a married woman, by reason of personal injuries received while a passenger on defendant's road.

Presumptively, damages for negligently diminishing the earning capacity of a married woman belong to her husband, and, when she seeks to recover such damages, the complaint must contain an allegation that for some reason she is entitled to the fruits of her own labor; or, if she seeks to recover damages for an injury to her business, she must allege that she was engaged in business on her own account, and by reason of the injury was injured therein as specifically set forth. No such allegations are contained in the complaint in this action.

Nevertheless the plaintiff was permitted to prove, against the objection of the defendant, that the evidence was irrelevant and immaterial, and called for special damages not alleged in the complaint; that she was engaged in the dressmaking business; sold fancy goods and dry goods; was accustomed to make from sixteen to twenty dollars per week; and that because of her injuries was prevented from working for two months. This was error. (*Gumb v. 23d St. R. Co.*, 114 N. Y. 411; *Saffer v. D. D. E. B. & B. R. R. Co.*, 24 N. Y. S. R. 210.)

The respondent in support of the ruling cited *Hartel v. Holland*, (19 Weekly Digest, 312) and *Ehrgott v. Mayor, etc.* (96 N. Y. 275).

But the question here presented, involving the right to recover damages, which the law does not presume to be the immediate and natural consequences of the injury in the absence of a special averment of such damages, does not appear to have been raised or passed upon in either case. Therefore they do not support the respondent's contention.

Statement of case.

As the exception taken to the ruling of the court referred to calls for a reversal of the judgment it is unnecessary to consider the other exceptions taken.

The judgment should be reversed.

All concur, except HAIGHT, J., not voting.

Judgment reversed.

CHARLES COUDEERT et al., as Administrators, etc., Respondents,
v. ISIDOR COHN et al., Appellants.

A party entering and paying rent under a parol lease for a term of years, which fixes an annual rental, becomes, by reason of the invalidity of the demise under the statute of frauds, a tenant from year to year, and a continuance of occupancy into a second year renders him chargeable with the rent until its close; he can only terminate his tenancy at the end of the current year.

The agent of F., plaintiffs' intestate, without having any written authority, executed a lease in writing of certain premises to defendants, for the term of two years and five months, commencing March 1, 1884, at a yearly rent named, payable in equal monthly instalments. Defendants entered into possession and continued to occupy and pay rent up to August, 1885, when they left the premises and sought to surrender possession to F., who declined to accept it. In an action upon the lease, *held*, that, plaintiffs were entitled to recover the rent to March 1, 1886; that the rental year then ended and defendants could not before that time terminate their tenancy; that the time for the termination of the tenancy in any year other than that of the designated expiration of time was governed by the time of entry, not by such designation.

Schuyler v. Leggett (2 Cow. 663); *People v. Rickert* (8 Cow. 230); *Doe v. Bell* (5 D. & E. 471.) distinguished.

(Argued December 18, 1889; decided January 14, 1890.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made February 15, 1887, which affirmed a judgment entered in favor of plaintiffs upon a verdict.

A. J. Simpson for appellants. The lease was void because not signed by the plaintiff, or his lawful agent, "thereunto authorized by writing." (2 R. S. 135, § 6; 4 id. [Banks, 8th ed.]

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Opinion of the Court, per BRADLEY, J.

2589; Woods on Stat. Frauds, 61.) The yearly term expired on August 1, 1885, and defendants having quitted then were not further liable. (*Doe v. Bell*, 5 Term Rep. 471; 2 Smith's L. C. 72; *People v. Rickert*, 8 Cow. 231; *Loughran v. Smith*, 75 N. Y. 205, 209.) The defendants are only liable for the time that they actually occupied, which is coincident with the expiration of the term, to-wit, August 1, 1885, and consequently there can be no recovery here. (*Thomas v. Nelson*, 69 N. Y. 118; *Prial v. Entwistle*, 10 Daly, 398; *Smith v. Genet*, N. Y. Daily Reg., Nov. 10, 1884; *Thomas v. Nelson*, 69 N. Y. 161.)

Geo. W. Roderick for respondent. The defendants are liable for the rent included in the judgment appealed from; they having entered into possession under the void lease, a yearly tenancy was created, and they having held over after the expiration of the first year, they are liable for at least another year's rent. (*Loughran v. Smith*, 75 N. Y. 205, 209; *Reader v. Sayre*, 70 id. 180, 183, 186; *Doe v. Terry*, 4 Ad. & El. 274; *Doe v. Bell*, 4 Term Rep. 471; 1 Cruise Dig. 281, 284; *People v. Rickert*, 8 Cow. 226; *Schuyler v. Leggett*, 2 id. 660; *Greton v. Smith*, 33 id. 245; *Clayton v. Blakey*, 8 Term Rep. 3; *Braythwaite v. Hitchcock*, 10 M. & W. 494.)

BRADLEY, J. The action was brought to recover rent of premises described in a written lease made by the agent of the plaintiffs' intestate to the defendants in January, 1884, for the term of two years and five months, commencing on the first day of March, 1884, and ending on the first day of August, 1886, at the yearly rent of \$3,000, payable in equal monthly payments, on the last business day of each month. The authority of the agent to make the lease not being in writing it was void. (2 R. S. 134, § 6.) The defendants went into possession on the first of March, 1884, and continued to occupy and pay rent up to August, 1885, when they left the premises and sought to surrender the possession up to the plaintiffs' intestate, who declined to accept it. He recovered for the amount of rent at

Opinion of the Court, per BRADLEY, J.

the rate mentioned in the lease from the first of August, to the first of March following. While the cases are not entirely in harmony on the subject, the doctrine now in this state is such that the defendants on going into possession of the premises and paying rent, became, by reason of the invalidity of the demise, tenants from year to year, and in such case the continuance of occupancy into the second year rendered them chargeable with the rent until its close. They could then only terminate their tenancy at the end of the current year. (*Reeder v. Sayre*, 70 N. Y. 180; *Laughran v. Smith*, 75 N. Y. 205.)

The question presented is: When did the rental year arising out of such relation commence and terminate? It is contended by the defendants' counsel that inasmuch as the end of the term designated by the terms of the lease was the first of August, 1886, that was the time when the yearly tenancy in contemplation of law terminated, and, therefore, the surrender was properly made on the first of August, 1885. It is urged that this view is in harmony with the recognized principle that, although the lease was invalid, the agreement contained in it regulated the terms of the tenancy in all respects, except as to the duration of the term, and *Doe v. Bell* (5 D. & E. 471) is cited. There a farm was, in January, 1790, let by a parole lease, void by the statute of frauds, for seven years, the lessee to enter upon the land when the former tenant left, on Lady-day, and into the house on the 25th of May following, and was to quit at Candlemas. He entered accordingly and paid rent. A notice was served upon the tenant September 22d, 1792, to quit on Lady-day. In ejectment brought against him it was claimed, on the part of the lessee, that his holding was from Candlemas, and, therefore, the notice was ineffectual to terminate the tenancy. Lord Kenyon, in deciding the case, said and held that "it was agreed that the defendant should quit at Candlemas, and though the agreement is void as to the number of years for which the defendant was to hold, if the lessor choose to determine the tenancy before the expiration of the seven years, he can only put an end to it at Candlemas." That case has in several instances been cited by the courts of

Opinion of the Court, per BRADLEY, J.

this state upon the question of the force remaining in the terms of the agreement embraced in a void lease. And in *Schuyler v. Leggett* (2 Cow. 663), it was remarked by Chief Justice SAVAGE, in citing it, that such an agreement "must regulate the terms on which the tenancy subsists in other respects; as the rent, the time of year when the tenant must quit, etc." And the citation was repeated to the same effect by the Chief Justice in *People v. Rickert* (8 Cow. 230).

The question here did not arise in either of those two cases, nor can they be treated as authority that the time for termination of a tenancy from year to year, in any year other than that of the designated expiration of term, is governed by such designation in a void lease for more than one year rather than by the time of entry. The effect sought to be given in the present case to the case of *Doe v. Bell* is not supported by English authority. In *Berrey v. Lindley* (3 M. & G. 496), the tenant entered into possession of premises under an agreement void by the statute of frauds, by the terms of which he was to hold five years and a half from Michaelmas. Several years after his entry, and after expiration of the period mentioned in the agreement, the lessee gave notice to his landlord to terminate the tenancy at Michaelmas. It was there contended on the part of the latter, and *Doe v. Bell* was cited in support of the proposition, that the time designated in the agreement for the termination of the tenancy governed in that respect. But the court decided otherwise, and held that the notice was effectual to terminate the tenancy. The views of the court there were to the effect, that, although the tenancy was from year to year, the tenant might without notice have quit at the expiration of the period contemplated in the agreement, but having remained in possession and paid rent subsequently to that time, he must be considered a tenant from year to year with reference to the time of the original entry.

The same principle in respect to holding over a term was announced in *Doe v. Dobell* (1 A. & E. [N. R.] 806), where it was said that "in all cases the current year refers to the time of entry unless the parties stipulate to the contrary."

Opinion of the Court, per BRADLEY, J.

The doctrine of the English cases seems to be that a party entering under a lease, void by the statute of frauds, for a term, as expressed in it, of more than one year, and paying rent is treated as a tenant from year to year from the time of his entry, subject only to the right to terminate the tenancy without notice at the end of the specified term. And to that extent and for that purpose only, the terms of agreement, in such case, regulate the time to quit. This right is held to be reciprocal. (*Doe v. Stratton*, 4 Bing. 446.) That proposition is not without sensible reason, for its support. The lease for more than one year, unless made in the manner provided by the statute, cannot be effectual to vest the term in the lessee, yet in other respects the rights of the parties may be determined by its terms, so far as they are consistent with its failure, to create any estate or interest in the land or any duration of term for occupancy by the lessee. And that principle is properly applicable to such leases. (*Porter v. Bleiler*, 17 Barb. 154; *Reeder v. Sayre*, 70 N. Y. 184; *Laughran v. Smith*, 75 N. Y. 205, 209.)

This view does not aid the defendants. They became tenants from year to year as from the time of their entry; and although by virtue of the terms of the agreement, in that respect, in the lease, they may have been at liberty to quit on the first of August, 1886, if they had remained until then, such time in that, or the year previous, could not be treated as the end of any year of the tenancy. The defendants having entered upon the second year from the time of the original entry, it was not within their power to terminate their relation or liability as tenants until the end of the then current year, which did not terminate until the first of March, was reached.

The conclusion, from these views, necessarily follows that the judgment should be affirmed.

All concur, except BROWN, J., not sitting.

Judgment affirmed.

Statement of case.

JOSEPHINE BOYCE, Respondent, v. THE MANHATTAN RAILWAY COMPANY, Appellant.

In an action to recover damages for injuries, alleged to have been caused by defendant's negligence, it appeared that the platform of one of its stations is built on a curve; and so, that while the middle part of each car stopping there comes close to the platform the ends are about fourteen inches therefrom, and there is an open space between the steps of the car and the station platform of about that width. Plaintiff, a passenger, in attempting to alight from a car at this station was injured by falling into this opening. She had never landed there before; the space between the steps of the car and the platform was left open and unguarded; no warning or assistance was given by the persons in charge of the train, and there was but a single light at the station which was quite remote from the point where the accident occurred. There was evidence to the effect that it was so dark at the time that the hole could not be seen. *Held*, the question of defendant's negligence, and of contributory negligence on the part of the plaintiff was properly submitted to the jury; that defendant, by stopping its trains at the point in question, invited its passengers to alight there and was charged with the duty of using due care to provide proper and safe means of getting from its cars to the platform; that if the open space was necessary, owing to the peculiarities of the location, some precaution adapted to it should have been used, such as throwing a plank across, or stationing a trainman to assist passengers in alighting; at least it should have been well lighted, so that the hole could have been easily seen and the danger avoided; also, that plaintiff, being ignorant of any circumstance requiring the use of special care, was relieved from showing that she exercised it; that under the circumstances, which she had a right to assume existed, she was under no obligation, as matter of law, to look before she put her foot down, but it was for the jury to decide whether she should have been more vigilant and whether, had she looked, she could have seen the hole.

Reported below (22 J. & S. 286).

(Argued December 18, 1889; decided January 14, 1890.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made March 14, 1887, which affirmed a judgment in favor of plaintiff, entered upon a verdict, and affirmed an order denying a motion for a new trial.

This was an action to recover damages for personal injuries caused by the alleged negligence of the defendant.

The facts are sufficiently stated in the opinion.

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Statement of case.

Samuel Blythe Rogers for appellant. Not only is there no evidence on the plaintiff's part of freedom from contributory negligence, but such contributory negligence affirmatively appears from the uncontradicted evidence. (*Johnson v. H. R. R. Co.*, 20 N. Y. 65; *Reynolds v. N. Y. C., etc., R. R. Co.*, 58 id. 248; *Cordell v. N. Y. C., etc., R. R. Co.*, 75 id. 330, 332-333; *Tolman v. S., etc., R. R. Co.*, 98 id. 198, 202, 204; *Galvin v. Mayor, etc.*, 112 id. 223, 228; *Hart v. H. R. B. Co.*, 84 id. 56; *Hanrahan v. M. R. Co.*, 53 Hun, 420; *Cummins v. City of Syracuse*, 100 N. Y. 637; *Dubois v. City of Kingston*, 102 id. 219; *Palmer v. P. R. R. Co.*, 111 id. 488; *Taplin v. R. R. Co.*, 106 id. 136, 142.)

T. Henry Dewey for respondent. There was no error committed in the ruling in regard to the admission of testimony. (*Crosby v. Day*, 81 N. Y. 242; *Bergtman v. Jones*, 94 id. 51; *Levin v. Russell*, 42 id. 251; *Quimby v. Strauss*, 90 id. 664; *Crosby v. Day*, 81 id. 242; 1 Greenleaf on Evidence, § 102; *Teachout v. People*, 41 N. Y. 7; *Gwitermann v. S. Co.*, 83 id. 358, 366.) Four witnesses testified that the hole existed and was unguarded, and that there was no light upon the platform near the place of the accident, and that it was so dark that they could not see the hole. This was conclusive proof of negligence. (S. & R. on Neg., § 447; *Martin v. G. N. R. Co.*, 16 C. B. 179; *Cornman v. E. C. R. Co.*, 4 H. & N. 781.) The claim that in cases where the defendant is passive and the plaintiff active, that the want of contributory negligence must be proved by direct testimony, and cannot be inferred from circumstances, is not supported by principle or authority. (*Johnson v. H. R. R. Co.*, 20 N. Y. 64; *Tolman v. S., etc., R. R. Co.*, 98 id. 198; *Ernst v. H. R. R. Co.*, 35 id. 9; *Wilds v. H. R. R. Co.*, 24 id. 430; *Lea v. Troy, etc., Gas Co.*, 98 id. 115; *Maher v. Cent. Park, etc., R. R. Co.*, 67 id. 52; *Jones v. N. Y. C. R. R. Co.*, 10 Abb. [N. C.] 200; *Tabor v. D., etc., R. R. Co.*, 71 id. 489; *Nowell v. Mayor, etc.*, 54 Supr. Ct. 382; *Mayo v. B., etc., R. R. Co.*, 104 Mass. 137; *Prentiss v. Boston*, 112 id. 43; *Bill v. Smith*, 39 Conn. 206;

Statement of case.

Johnson v. H. R. R. Co., 20 N. Y. 64; *Morrison v. N. Y. C. R. R. Co.*, 63 id. 643; *N. C. R. R. Co. v. State*, 31 Md. 357; *Gay v. Winter*, 34 Cal. 153; *McDougal v. C. R. R. Co.*, 63 id. 431; *Greenleaf v. I. C. R. R. Co.*, 29 Iowa, 14; *Allen v. Willard*, 57 Penn. St. 374; *C., etc., R. R. Co. v. Rowan*, 66 id. 393; *Thomas v. D., etc., R. R. Co.*, 29 Fed. Rep. 731; *Thomas v. D., L. & W. R. R. Co.*, 11 Rep. 739; *Willey v. Mulledy*, 78 N. Y. 310; *Hart v. H. R. B. Co.*, 80 id. 622; *Mahony v. City of Buffalo*, 91 id. 657; *Schwandner v. Birge*, 33 Hun, 186; *Cassidy v. Angel*, 12 R. I. 447; *Tolman v. S., etc., R. R. Co.*, 98 N. Y. 198; *Reynolds v. N. Y. C. R. R. Co.*, 58 id. 248; *Greenleaf v. I. C. R. R. Co.*, 20 Iowa, 14; *Brown v. C. P. R. R. Co.*, 68 Cal. 171; *Johnson v. H. R. R. Co.*, 20 N. Y. 64; *Schwandner v. Birge*, 33 Hun, 186; *Cassidy v. Angel*, 12 R. I. 447.) Admitting, for the purpose of argument only, that the case at bar from its nature comes within the rule sought to be established by the defendant, and positive evidence is necessary to prove the want of contributory negligence, there is such evidence that the plaintiff did all those things which the defendant claims to be essential to her recovery. (*Tolman v. S., etc., R. R. Co.*, 98 N. Y. 198; *Becht v. Corbin*, 92 id. 558; *Connolly v. N. Y. C. R. R. Co.*, 88 id. 346; *Greany v. L. I. R. Co.*, 101 id. 409; *Hoffman v. U. F. Co.*, 68 id. 386; *Bell v. N. Y. C. R. R. Co.*, 29 Hun, 560; *Hart v. H. R. B. Co.*, 80 N. Y. 622; *Northrup v. N. Y. O., etc., R. R. Co.*, 37 Hun, 295; *Vorst v. L. S., etc., R. R. Co.*, 54 id. 346; *Kellogg v. C. R. R. Co.*, 79 id. 72.) The damages awarded were not excessive. (*Coleman v. Southwick*, 9 Johns. 51; *Austin v. S. & R. R. R. Co.*, 20 Barb. 285; *Hegeman v. W. R. R. Co.*, 16 id. 353; *Minick v. City of Troy*, 19 Hun, 253; *Bierbauer v. R. R. Co.*, 77 N. Y. 588; *Gale v. R. R. Co.*, 13 Hun. 1; 2 Wood's Railway Law, 1226, note 2.) The verdict was not contrary to the evidence, and should not be disturbed. (*Cornman v. E. C. R. Co.*, 14 H. & N. 787; *Sher. & Red. on Neg.* 518, note 2; *N. J. R. R. Co. v. Kennard*, 21 Penn. St. 203; *Pierce on Am. R. Law*, 475; *Hegeman v. W. R. Co.*, 13 N. Y. 9.)

Opinion of the Court, per VANN, J.

VANN, J. The defendant, as a carrier of passengers, operates a line of elevated railway, extending from Harlem to South ferry in the city of New York. The east platform of the South ferry station is built on a curve and each car, as it stops there, touches the curve at a tangent, so that the middle part is within one or two inches of the platform, while the ends are about fourteen inches therefrom. The result of this is an open space between the steps of the car and the platform of the station, several feet long and fourteen inches wide. On the 25th of January, 1885, the plaintiff was a passenger upon a train of the defendant which reached South ferry at about half past six in the evening. Accompanied by three friends she left the car and attempted to reach the platform of the station. She was not familiar with the locality, having never landed there before, and the space between the steps of the car and said platform was open and unguarded. Nothing was put across the hole for passengers to step on as they alighted and no warning or assistance was given by the persons in charge of the train. If the passengers saw the hole they could step across it, but unless they saw it there was nothing to prevent them from stepping into it. As the jury is presumed to have found, upon sufficient evidence, there was but a single light from one end of the station to the other and that was at a point quite remote from the open space in question. While some light came through the car windows it did not reach the hole, which was in the shadow of the end and lower part of the cars. The plaintiff was the third in the little procession of four as it approached this spot. Her brother, who was in advance, stepped off first and just reached the edge of the platform of the station with the tip of his right foot and was forced to make a quick step with his left foot in order to save himself from falling into the open space. As he turned to give warning to the others he was pushed forward by his younger sister, Rhoda, who closely followed him and whose dress covered the hole so that it could not be seen. When the plaintiff, who was just behind her sister, attempted to cross she stepped into the open space, fell through the hole and was severely injured. There was

Opinion of the Court, per VANN, J.

evidence tending to show that it was so dark that the hole could not be seen.

It is not essential to inquire why the railroad was constructed with so sharp a curve at the place where this accident occurred, nor whether the defendant is responsible for the way that the South ferry station was built. By stopping its trains at the point in question, it invited the passengers to alight and was thereby charged with the duty of using due care to provide proper and safe means of getting from the platform of the cars to the platform of the station. Even if the open space was necessary, owing to the peculiarities of the location, it was not necessary to leave it unguarded or unlighted. Some precaution, adapted to the situation, could have been used, such as throwing a plank across, or stationing a trainman to warn and assist passengers in alighting. At least the unguarded hole could have been well lighted, so as to be easily seen, and the passengers thus enabled to avoid the danger. We think that the evidence required the submission of the case to the jury for them to determine whether, under all the circumstances, the defendant was guilty of negligence that caused the injuries sustained by the plaintiff. (*Smith v. N. Y. & H. R. R. Co.*, 19 N. Y. 127; *Hulbert v. N. Y. C. R. R. Co.*, 40 N. Y. 145; *Sexton v. Zett*, 44 N. Y. 430; *Weston v. N. Y. E. R. R. Co.*, 73 N. Y. 595; *Hoffman v. N. Y. C. & H. R. R. Co.*, 75 N. Y. 605; *Dobiecki v. Sharp*, 88 N. Y. 203.)

The statement of facts already made is a sufficient answer to the claim of the defendant that the plaintiff was guilty of contributory negligence, as matter of law, and that no question in that regard was presented for the consideration of the jury. In the cases cited in support of this position the person injured knew, or should have known, of the danger to be encountered and hence was required to give general evidence that he exercised proper care, but in this case the plaintiff was ignorant of any circumstance requiring the use of special care and hence was relieved of the necessity of showing that she used special care. While the actual situation was dangerous, the apparent situation was free from danger. With her limited knowledge of the facts,

Statement of

what should she have done that what everybody does is all that any of danger, she did what the other known of the hole, or if it had be see it by the exercise of ordinary would have been presented. Und she had the right to assume existed, as matter of law, to look before she was a question of fact for the jury she should have been more vigilan had looked, she could have seen th darkness. (*Johnson v. H. R. R. R. v. H. R. R. R. Co.*, 35 N. Y. 9; *A R. R. R. Co.*, 63 N. Y. 643; *Taber* 71 N. Y. 489; *Hart v. H. R. B.*)

The circumstances did not requi tributary negligence should be show they permitted the inference to be tendency of all the evidence in fav

As no other question has been p we think that the judgment should

All concir.

Judgment affirmed.

GEORGE PEABODY WETMORE, App
BRUCE, Respc

In an action to compel the specific perfe plaintiff agreed to sell and convey, free defendant a house and lot in the city the former owners of the land in the question where situated had mutually c feet of the front of the lots should no should be forever left open for cour evidence to sustain the finding, that t injured by said covenant. *Held*, the was not free and clear from incumbri an incumbrance; and that defendant plete his purchase.

Riggs v. Purcell, (66 N. Y. 198), distingu

Statement of case.

Also, *held*, that defendant was entitled to recover as damages by way of counter-claim the percentage paid by him at the time of purchase, the auctioneer's fees and the expenses paid for examining the title.

Adjoining owners of land may by grant impose mutual and corresponding restrictions upon the lands belonging to each, for the purpose of securing uniformity in position of the buildings. The covenants being mutual, and imposing such restriction in perpetuity, are in effect reciprocal easements, the right to the enjoyment of which passes as appurtenant to the premises and will be enforced by a court of equity.

Such a covenant, therefore, creates an incumbrance.

A reversal of a judgment will not be granted because a finding of fact is without evidence to support it, unless it is a material fact and to some extent at least gives support to the judgment rendered.

Reported below (22 J. & S. 149).

(Argued December 18, 1889 ; decided January 14, 1890.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made the first Monday of December, 1886, which affirmed a judgment in favor of defendant entered upon a decision of the court on trial at Special Term.

The nature of the action and the facts are sufficiently stated in the opinion.

William Man for appellant. The refusal of the trial court to find that the defendant had notice of the restriction at the time of purchase, and his finding that defendant had no such notice were errors of law. (*Sickels v. Flanagan*, 79 N. Y. 224.) The defendant cannot succeed on the defense of the court-yard agreement, as she had notice of it when she purchased. (*Stevens v. Hauser*, 39 N. Y. 302, 304.) The finding of the trial court that the restriction in question is a damage to this property is unsupported by evidence, and is an error of law for which the judgment should be reversed. (*Pollock v. Pollock*, 71 N. Y. 137, 153 ; *Putnam v. Hubbell*, 42 id. 106 ; *Dwight v. G. L. Ins. Co.*, 103 id. 341, 358, 359. The court should have found as requested by the plaintiff, that this restriction is not a damage to the land, but, including the corresponding easement over all the lands fronting on the park, is a benefit and an enhancement of value. (*James v. Cowing*, 82 N. Y. 457, 459 ; *Hendricks v. Stark*, 37 id. 106 ;

Opinion of the Court, per PARKER, J.

Riggs v. Pursell, 66 id. 193; *Post v. Bernheimer*, 31 Hun, 247; *Hellreigel v. Manning*, 97 N. Y. 56.) Should this block front ever change its character and become business property, the restriction will be rendered nugatory by the altered circumstances, as, for instance, if a railroad station be put in the square. (*Trustees, etc., v. Thacher*, 87 N. Y. 311; 1 Story's Eq. Juris. [10th ed.], § 750.) The court erred in giving judgment against the plaintiff for the \$5,200 deposited with the auctioneer by the defendant on her purchase. (*Cockcroft v. N. Y. & H. R. R. Co.*, 69 N. Y. 201, 208.)

Charles Jones for respondent. In every contract for the sale of land, there is an implied warranty on the part of the vendor that he has a good title to that which he assumes to sell, unless such warranty is expressly excluded by the terms of the contract. The court-yard agreement, made by the former owners of the lot in question and of the adjoining lots fronting on the street, is an incumbrance on the lots. This mutual covenant imposed a restriction in perpetuity upon the lots, and in equity the premises are charged with the observance of the covenant in the hands of all subsequent grantees taking title with notice of its existence, and a court of equity will enforce specific performance of the contract. (*Trustees v. Lynch*, 70 N. Y. 440; *Lattimer v. Livermore*, 72 id. 174; *P. Ins. Co. v. C. Ins. Co.*, 87 id. 400; *Perkins v. Codrington*, 4 Robt. 647; *Roberts v. Levy*, 3 Abb. [N.S.]; *Anonymous*, 2 Abb. [N. C.], 56; *In re Whitlock*, 32 Barb. 28; *In re Andrus*, 12 Phila. 45.) The court found, as matter of fact, that the restrictions and incumbrances created by the court-yard agreement were a damage to the lot of land in question, and injured its salability and marketability; this finding is conclusive on appeal to this court, and this rule applies to actions in equity as well as to actions at law. (*Stillwell v. M. L. Ins. Co.*, 72 N. Y. 385.)

PARKER, J. This action was brought to compel the defendant to specifically perform an agreement made by her to purchase the house and lot, No. 19 Washington square, north, in

Opinion of the Court, per PARKER, J.

the city of New York, which the plaintiff agreed to sell and convey free and clear of all incumbrances.

The defendant in her answer, among other objections to the title, averred that the former owners of the land in the block in which the house and lot are situated had mutually covenanted and agreed that twelve feet of the front of the lot in question, and of the other lots in the block, should not at any time be built upon, but should forever be left open for court-yards.

That such agreement was in full force and constituted a restriction and incumbrance which depreciated the value of the property. The defendant also, by way of counter-claim alleged that she had sustained damages, because of the inability of plaintiff to give a title free and clear of all incumbrances, consisting of the percentage paid on account of the purchase-price, the auctioneer's fees, and the expenses paid for examining the title.

The plaintiff in his reply admitted the making of the agreement set forth in the answer, but denied that it amounted to an incumbrance or restriction in the proper meaning of the words, or that it impaired the value of the premises.

It is entirely competent for adjoining owners of land by grant to impose mutual and corresponding restrictions upon the lands belonging to each, for the purpose of securing uniformity in the position of buildings.

The covenants being mutual and imposing such restriction in perpetuity are in effect reciprocal easements, the right to the enjoyment of which passes as appurtenant to the premises.

Observances of such a covenant will be enforced by a court of equity. (*Lattimer v. Livermore*, 72 N. Y. 174; *Trustees Col. College v. Lynch*, 70 id. 440; *Phoenix Insurance Co. v. Continental Insurance Co.*, 87 id. 400; *Perkins v. Codrington*, 4 Robt. 647.)

The title, then, which the plaintiff tendered was not free and clear from all incumbrance for certainly a covenant, valid and enforceable in equity, which so limits and restricts the use of twelve feet in depth along the entire front of a city lot as to prevent building thereon is an incumbrance.

Opinion of the Court, per PARKER, J.

Upon the trial the plaintiff, by evidence tending to show that the existence of the agreement did not depreciate but rather enhanced the value of the premises, sought to bring the case within the decision of the court in *Riggs v. Pursell*, (66 N. Y. 193). In that case the purchaser at a judicial sale refused to take title. The court said "while the agreement requires that a court-yard shall be left in front of this lot, for the benefit of the other lots on the street, it also requires that a court-yard shall be left in front of all the other lots for the benefit of this; and all the houses on the street have been built in conformity to this agreement. While this agreement may in one sense be regarded as an incumbrance upon this lot, it cannot be assumed, without proof, that it injuriously affects its value to to any extent whatever." And it was held to be an immaterial defect. But in the case before us the trial court found that the restriction and incumbrance created by the covenant and agreement did, in fact, damage the property, and injure its salability and marketability. The General Term having affirmed the finding, it cannot be reviewed here as there is some evidence to support it. As the case is now presented, therefore, *Riggs v. Pursell* cannot be invoked in aid of the appellant, and it is unnecessary to consider whether the doctrine of that case would be applicable to a private sale, where the vendor contracts to give a good title in fee simple free and clear of all incumbrances. It follows that the refusal of the court to decree specific performance must be sustained.

It was not error to render judgment in favor of the defendant for the percentage paid at the time of purchase, the expense incurred in the examination of title, and the auctioneer's fees. (*Cockcroft v. N. Y. & H. R. R. Co.* 69 N. Y. 201.)

The appellant contends that the finding of the trial court that the defendant did not have notice of the restriction, is wholly without evidence to support it, and an exception having been taken, an error of law is presented which demands a reversal of the judgment. A reversal will not be granted when a finding is made without evidence to support it unless it is a material fact, and to some extent, at least, gives support

Statement of case.

to the judgment rendered. The defendant insisted upon the rights secured to him by his contract. He had but to demonstrate that the deed tendered failed in a material respect to comply with its terms in order to become entitled to the judgment rendered. It might have availed the plaintiff, could he have shown that the defendant had notice of the restriction and purchased with full knowledge of its existence and effect.

But in the absence of evidence warranting a finding to that effect the defendant was not aided, nor the plaintiff harmed by a contrary finding.

The other facts found by the trial court abundantly sustain its conclusion of law.

The error complained of, therefore, does not justify a reversal of the judgment.

There are no other questions requiring consideration.

The judgment should be affirmed.

All concur, except HAIGHT, J., not voting.

Judgment affirmed.

DANIEL B. FAYERWEATHER et al. Appellants, v. THE PHENIX
INSURANCE COMPANY, Respondent.

Plaintiffs shipped a cargo of leather, under a bill of lading which provided that the carrier should have the full benefit of any insurance that may have been effected upon the goods. The goods having been injured through the negligence of the carrier's employes, plaintiff brought this action upon a policy issued thereon by defendant, which provided that in case of loss defendant should be subrogated to plaintiffs as to all claims against the transporters of said merchandise, not exceeding the amount paid by said insurer, and that plaintiffs would make no agreement or do any act whereby this right of action against the carrier for losing or injuring the leather should be released or cut off. *Held* that the provision in the bill of lading cut off the insurers rights to be subrogated to the rights and remedies of the owner against the defaulting carrier, and that thereby plaintiffs' right to recover upon the policy was defeated.

Jackson Co. v. B. M. Ins. Co. (139 Mass. 508); *Inman v. S. C. R. Co.* (129 U. S. 128), distinguished.

Reported below (22 J. & S. 545).

(Argued December 18, 1889; decided January 14, 1890.)

APPEAL from judgment of the Court of the city of New York & May 4, 1887, which affirmed a judgment entered upon a decision of Term.

This action was upon a policy & The material facts are stated in

Wm. H. Arnoux for appellants. is a unilateral instrument preparations are to be construed strictly ably to the insured. (May on Ins., of insurance gave to plaintiffs a defendants for the loss sustained by vessel, notwithstanding such loss was act of one of the mariners. (*H. N. Y.* 77, 86; *Davidson v. Burn* *Holder v. M. M. Ins. Co.*, L. R. [*Co. v. E. T. Co.*, 117 U. S. 323.]) not defeated by any provision contained (*P. Ins. Co. v. E. T. Co.*, 117 U. S. *B. M. Ins. Co.*, 139 Mass. 508, 51

George A. Black for respondents. bill of lading having made it impossible to do what they agreed with the defendants to recover. (*Bank of Kentucky v. 183*; *R. R. Co. v. Lockwood*, 17 *Pratt*, 22 id. 123; *The Brantford P. I. Co. v. E. & W. T. Co.*, *N. Y. C. R. R. Co.*, 21 Blatch *C. R. R. Co.*, 108 N. Y. 364; *Co.*, 18 Fed. Rep. 473; *M. M. Y.* 173, 175; 2 Phillips on Insurance *A. Ins. Co. v. Storrow*, 1 Edw. *Inman v. S. C. R. R. Co.*, 129 not shown to be seaworthy. (*V*

Opinion of the Court, per FOLLETT, Ch. J.

N. Y. 350, 353.) The proof that there was no storm or collision showed that the vessel was not sunk by a sea peril. (*Atkinson v. G. W. Ins. Co.*, 65 N. Y. 553; *Grim v. P. Ins. Co.*, 13 Johns. 451; *Riggin v. P. Ins. Co.*, 7 H. & J. 279; *Cleveland v. N. Ins. Co.*, 8 Mass. 308; 2 Arnould on Mar. Ins., 774, 777.)

FOLLETT, CH. J. The plaintiffs were the owners of 211 bales of leather, which the Old Dominion Steamship Company undertook to transport by its steamer Guyandotte from Norfolk, Va. to New York, and deliver to the owners. The vessel reached New York, June 17, 1885, with the leather safe on board, and within twenty-four hours after arrival she sunk at her dock through the negligence of the employees of the steamship company. By this accident the leather was injured, as it is agreed, to the plaintiff's damage in the sum of \$1,295.32. In considering this case, the liability of the carrier to the owners of the leather for this loss, will be assumed. The bill of lading under which the leather was shipped contained this provision :

"It is further stipulated and agreed that in case of any loss, detriment or damage to be sustained by any of the property herein receipted for during such transportation, whereby any legal liability or responsibility shall or may be incurred by the terms of this contract, that company alone shall be held answerable therefor in whose actual custody the same may be at the time of happening of such loss, detriment or damage, and the carrier so liable shall have the full benefit of any insurance that may have been effected upon or on account of said goods."

The defendant insured the plaintiffs against the loss sustained by them by an open, time, marine policy which contained these provisions :

"In the event of loss, the assured agrees to subrogate to the insurers all their claims against the transporters of said merchandise, not exceeding the amount paid by said insurers."

* * * * *

Opinion of the Court, per FOLLETT, Ch. J.

“In case of any agreement or act, past or future, by the insured, whereby any right of recovery of the insured, against any persons or corporations, is released or lost, which would, on acceptance of abandonment or payment of loss by this company, belong to this company, but for such agreement or act, or in case this insurance is made for the benefit of any carrier or bailee of the property insured, other than the person named as insured, the company shall not be bound to pay any loss; but its right to retain or recover the premium shall not be affected.”

This action is prosecuted by the assured owners to recover from the insurer their loss so sustained; and it is defended on the ground that the owners violated the provision of the contract of insurance above quoted, by contracting with the carrier, without the insurer's knowledge, that the carrier in case of liability for loss, should have the benefit of the insurance, and, in effect, that the insurer on paying the owners loss should be deprived of its right to be subrogated to the owners right of action against the carrier for injury to the leather.

When goods in the hands of a common carrier for transportation are insured by the owner, and are subsequently lost or injured under circumstances rendering the carrier liable to the owner for the damages and the insurer pays the loss to the owner, the insurer in the absence of stipulations between the carrier and owner defeating the right, is entitled to be subrogated to the rights and remedies of the owner against the carrier. (*Hull v. Railroad Co.*, 13 Wall. 367; *C. F. Ins. Co. v. Erie Railway Co.*, 73 N. Y. 399; *Sheld. on Sub.* § 329). But the struggle between carriers and insurers to escape the liability imposed under the usual bills of lading and policies, by casting the burden of the loss upon the other by the insertion of unusual and astute provisions in their respective contracts with the owner, has rendered this simple rule of law quite inapplicable to many of the cases arising under such special contracts.

The provision quoted from the bill of lading cut off the insurer's right to be subrogated to the rights and remedies of

Opinion of the Court, per FOLLETT, Ch. J.

the owner against the defaulting carrier. (*M. M. Ins. Co. v. Calebs*, 20 N. Y. 173; *Platt v. R. Y. R. & C. R. R. Co.* 20 J. & S. 496; aff'd. 108 N. Y. 358; *Phoenix Ins. Co. v. Erie & Western Trans. Co.*, 10 Biss. 18; aff'd. 117 U. S. 312; 118 id. 210.) It has been held, *Jackson Co. v. Boylston Mutual Ins. Co.* (139 Mass. 508), in an action by the owner against the insurer for the recovery of a loss covered by the policy and caused by the actionable negligence of the carrier, that a stipulation between the owner and carrier, giving the latter the benefit of an insurance upon the goods, is not a defense to the insurer, and that a provision in the policy: "That this insurance shall be void in case the policy or the interest insured thereby shall be sold, assigned, transferred or pledged without the consent in writing of the insurer," is not violated by the agreement between the owner and carrier that the latter should have the benefit of any insurance on the goods carried.

In *Inman v. South Carolina Railway Company* (129 U. S. 128), the defendant, a common carrier, transported cotton under a bill of lading which contained a stipulation that the carrier incurring any legal liability for the loss of the cotton "shall have the benefit of any insurance which may have been effected upon or on account of said cotton." The owners insured the cotton under policies which contained this stipulation: "And any act of the insured waiving or transferring, or tending to defeat or decrease any such, (the insurer's) claim against the carrier, or such other person or persons, whether before or after the insurance was made under this policy, shall be a cancellation of the liability of the said insurance company for or on account of the risk insured for which loss is claimed. In event of loss the assured agrees to subrogate to the insurers all their claims against the transporters of said cotton, not exceeding the amount paid by said insurers." The cotton was lost by the negligence of the carrier. The insurers adjusted the loss but did not pay the owner, agreeing with him that he should sue the carrier without prejudice to his claims under the policies, and that interest should be allowed upon the

Statement of case.

claim as adjusted until it could be collected. The assured owner sued the carrier, which defended on the ground that by the stipulation in the bill of lading it was entitled to the insurance effected on the cotton, which the owner had nullified by accepting a policy containing the stipulation quoted. It was held that the stipulation in the policy was not a defense. It is unnecessary to determine whether the reasons given for the judgment in the case last cited can be harmonized with the reasons given for the judgments in the previous cases hereinbefore cited, because none of the cases determine the precise question presented in the case at bar.

The plaintiffs in this action expressly stipulated that they would make no agreement, nor do any act whereby their right of action against the carrier for losing or injuring the leather should be released or cut off, and that in case the carrier became liable to the plaintiffs for losing or injuring the leather, the defendant, the insurer, on paying the loss, should be subrogated to their right of action against the carrier. By the contract entered into between the plaintiffs and the carrier, the rights stipulated for by the insurer have been wholly nullified and cut off, which defeats the plaintiffs right to recover on the policy. (*Carstairs v. Mechanics & Traders Ins. Co.*, 18 Fed. Rep. 473.)

The judgment should be affirmed, with costs.

All concur, except HAIGHT, J., not voting.

Judgment affirmed.

HERMAN ROSENBERG et al., Respondents, v. HUGO BLOCK et al.,
Appellants.

In an action by the owner of goods delivered to a commission merchant for sale, against the latter, to recover as for money had and received, the proceeds of sale, it is incumbent on the plaintiff to show either that the defendant has actually received pay for the goods, or such a state of facts as will preclude him from denying receipt

In such an action it appeared that the goods were sold and sale reported before the commencement of the action. The report of sale did not

Statement of case.

state as to whether the goods had been paid for or not, but defendants claimed to apply the amount on an individual indebtedness to them. Defendants' evidence on the trial was to the effect that the goods were not in fact paid for until after the commencement of the action. *Held*, a refusal to submit to the jury the question as to whether defendants had actually received the proceeds of sale before suit brought, and as to whether they were by their acts estopped from denying it was error; that while in the absence of evidence of authority to sell on credit, the presumption from a simple report of sale would be that the sale was for cash, the presumption was not conclusive, and evidence to the contrary having been given, the question was one of fact for the jury. Reported on a former appeal (102 N. Y. 255).

(Argued December 20, 1889; decided January 14, 1890.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made May 2, 1887, which affirmed a judgment in favor of the plaintiffs entered upon a verdict and affirming an order denying a motion for a new trial.

The complaint in this action alleged that the plaintiffs, as a limited partnership formed pursuant to the Code of Virginia under the firm name of "H. Rosenberg," on the 4th of August, 1882, delivered to the defendants, as commission merchants, a quantity of merchandise for sale; that the defendants, as the agents of the plaintiffs, sold the same for \$800, which they received but have not paid over, although due demand has been made therefor. The answer pleads in substance: (1.) A general denial; (2.) a misjoinder of parties plaintiff, because, according to the Virginia Code, the action should have been brought in the name of the general partner only; (3.) that Herman Rosenberg, with the consent of his co-plaintiff, held himself out as carrying on business in his own name and so dealt with the defendants, who sold the merchandise in question and accounted to him individually for the proceeds; (4.) that the business really belonged to said Rosenberg, the special partnership being merely a device to keep his property from his creditors, including the defendants, who asked to off-set an old debt that he was owing them against the claim set forth in the complaint.

Statement of case.

It appeared upon the trial that on the 18th of January, 1882, said Rosenberg, who had been carrying on business at Richmond, Va., made a general assignment for the benefit of his creditors and thereby preferred Fanny Bottigheimer, his sister, to the amount of \$3,363.67. On the twenty-fifth of the same month the entire estate so assigned, including \$411.34 in cash received for goods sold after the assignment, was transferred to Mrs. Bottigheimer on account of such preference. On February 2, 1882, the alleged special partnership was formed, the entire capital, consisting of stock and fixtures from the assigned estate at a cash valuation of \$2,600 and \$1,400 in money, being furnished by Mrs. Bottigheimer, while Mr. Rosenberg contributed only his skill and experience. When he carried on business in his own name it was as "H. Rosenberg," which was also the firm name of the limited partnership. Up to March 18, 1885, he drew out \$5,276.34, while she drew out \$3,600 by October 14, 1884, after which she drew no more. The liabilities of Rosenberg amounted to \$25,000, including \$1,593.43 that he owed the defendants, but no creditor except Mrs. Bottigheimer received anything.

During the spring of 1882 the plaintiffs, under the name of "H. Rosenberg," bought certain goods of the defendants, who received pay for the same upon delivery. On April 7, 1882, the defendants wrote to Rosenberg inquiring "in whose name do you at present carry on business," and he answered the next day saying: "I am carrying on business in my own name, having special partner with \$4,000 for three years." August 1, 1882, the plaintiffs shipped goods invoiced at \$780 to one Abrahams, who refused to receive them, whereupon they caused them to be delivered to the defendants in the city of New York, with instructions to sell them for fifty dollars less than the invoice price and to retain that sum for their commissions. The defendants received the goods accordingly, and August sixteenth telegraphed that they had been sold. August nineteenth they wrote to Rosenberg to the same effect and also stated that he was not entitled to any remittance, because he was already owing them \$900 more than the goods came to.

Statement of case.

Except as stated, the business and correspondence was conducted in the name of "H. Rosenberg."

Further facts are stated in the opinion.

Samuel W. Weiss for appellants. This action being to recover proceeds received by defendants, plaintiffs were bound to establish, as condition precedent to recovery, the receipt of the money by defendants before action commenced. (*N. T. Co. v. Gleason*, 77 N. Y. 400; *N. Y. G. & I. Co. v. Gleason*, 78 id. 503; 2 Greenl. on Ev., § 117; *Scott v. Rogers*, 31 N. Y. 676; *Lavery v. Snethen*, 68 id. 522; *Morris v. Rexford*, 18 id. 552; *Rodermund v. Clark*, 46 id. 357; *Moller v. Tuska*, 87 id. 166; *Rosenberg v. Block*, 17 J. & S. 488; *Lythgoe v. Vernon*, 5 H. & N. 180; *Southwick v. F. N. Bk.*, 61 How. Pr. 170; *Romeyn v. Sickels*, 108 N. Y. 652, 653; *N. Y. R. Co. v. Rothery*, 107 id. 310.) The court erred in admitting evidence, against defendants' objection and exception, of plaintiff, "that his assignment had not been attacked, as fraudulent, by any person except defendant. (*Worrall v. Parmelee*, 1 N. Y. 521, 522; *Williams v. Fitch*, 18 id. 551, 552; *Neudecker v. Kohlberg*, 81 id. 304, 305; *Baird v. Gillett*, 47 N. Y. 187, 188; *Anderson v. R. R. Co.*, 54 id. 341, 342; *Green v. Disbrow*, 56 id. 334; *O'Hagan v. Dillon*, 76 id. 172, 173.) The plaintiff Rosenberg was asked whether he had done all he was advised or believed it necessary to do towards giving the fact of partnership due publicity. The question was incompetent, as calling for a conclusion upon a material matter of inquiry. (*Nicolay v. Unger*, 80 N. Y. 54; *Terpenning v. C. E. Banks*, 43 id. 279.) The court erred in allowing plaintiff to read in evidence two answers to cross-interrogatories as they were not responsive and were secondary evidence. (*Lansing v. Cooley*, 13 Abb. Pr. 272; *Greenman v. O'Connor*, 25 Mich. 30; *Kingbury v. Moses*, 45 N. H. 222.) The complaint should have been dismissed upon the motions made when plaintiff rested, and when the testimony was closed. (*Van Ingen v. Whitman*, 62 N. Y. 513; *Maginn v. Lawrence*, 13 J. & S. 235; Code Civ. Pro. § 488, subd. 5;

Opinion of the Court, per VANN, J.

Simar v. Canady, 53 N. Y. 298; Code, § 144.) The court erred in submitting to the jury only the question relative to the alleged fraud in the special partnership, and in its refusal to submit the other facts as requested. (*Pratt v. Collins*, 20 Hun, 126; *Stacey v. Dacy*, 7 Term Rep. 359; *Carr v. Hinchliff*, 4 B. & C. 547; *Semenza v. Brinsley*, 18 C. B. [N. S.], 477; *Borries v. I. O. Bank*, L. R. [9 C. P.], 38; *Rosenberg v. Block*, 102 N. Y. 255; *Hogan v. Shorb*, 24 Wend. 462; *Moore v. Clementson*, 2 Camp. 22; Bouviers L. D. title "Price."

Theron G. Strong for respondent. The perfectly sufficient and complete answers to the appellant's argument that this action cannot be maintained because it is for money had and received are (1) that the Court of Appeals has decided that the action was maintainable, and (2) that even upon plaintiff's own theory the actual receipt of the proceeds of the goods is clearly established by the appellant's own admissions and acts. (*Rondon v. De La Rue*, 19 J. & S. 63; 98 N. Y. 653.) It is not unreasonable to presume in support of the judgment, in the absence of evidence to the contrary, Block failing to testify and the burden of proof being on the defendants, that Lindheim had notice on the subject. (Story on Part., § 107; *Weetjen v. S. P. & P. R. R. Co.*, 4 Hun, 529; *Warburton v. Camp*, 112 N. Y. 683; *Parish v. Parish*, 25 id. 58; *Tyler v. Gardner*, 35 id. 574; *Rollwagen v. Rollwagen*, 63 id. 504; *Bruce v. Kelly*, 7 J. & S. 37.)

VANN, J. When this case was before the court on a former appeal, the judgment then under review was reversed, because the defendants were not allowed to show that the property which went into the special partnership belonged, in fact, to Rosenberg, and that the transfer to his sister was only a device to defraud his creditors. (*Rosenberg v. Block*, 102 N. Y. 255.)

Upon the second trial the evidence formerly excluded was received, and the question whether the alleged partnership between Rosenberg and his sister was a fraud upon his credit-

Opinion of the Court, per VANN, J.

ors was submitted to the jury, who found for the plaintiffs. No other question was submitted to them for decision, although the defendants requested the court to charge "that the jury may not find a verdict in favor of the plaintiffs unless they find that the defendants had received money from the sale of the goods mentioned in the complaint herein prior to the commencement of this action." The exception to the refusal to charge as thus requested, with other exceptions addressed to the same point, raise the most important question presented by this appeal. It was alleged in the original complaint that the defendants, as agents of the plaintiffs, sold the goods, and instead of remitting the proceeds, unlawfully converted them to their own use, but there was no allegation that the proceeds of the sale had been received. Subsequently, upon motion of the plaintiffs, the complaint was amended by striking out the allegation that the proceeds had been converted by the defendants, and alleging in the place thereof that the proceeds had been received by them. The reason for this change, as stated by the attorney for the plaintiffs in the affidavit upon which the motion was based, was "that the plaintiffs seek to recover only on contract and fear that if the said allegations remain, the complaint may be construed as founded on tort." In another affidavit used by the plaintiffs on a motion for a commission to take testimony, it was stated that "this action is brought to recover moneys received by defendants as proceeds of goods delivered to them by plaintiffs to sell on commission." Thus the complaint of the plaintiffs, as formally interpreted by them, sets forth a cause of action for the proceeds received by the defendants for goods sold. This, as we think, is the proper interpretation. The plaintiffs do not attempt to disaffirm the sale and to make the defendants liable for breach of instructions or for conversion, but ratifying the sale, they seek to recover the proceeds received. (*Scott v. Rogers*, 31 N. Y. 676; *Laverty v. Snethen*, 68 N. Y. 522.) Thus the action is for money had and received, and hence it was incumbent on the plaintiffs to show either that the defendants had actually received pay for the goods, or such a state of facts as would

Opinion of the Court, per VANN, J.

preclude them from denying that they had received it. (*Nat. Trust Co. v. Gleason*, 77 N. Y. 400; *N. Y. G. & I. Co. v. Gleason*, 78 N. Y. 503; *Byxhie v. Wood*, 24 N. Y. 607; 2 Greenl. Ev., § 117; Abb. Trial Ev., 275.)

There was no direct evidence tending to show that the defendants had received payment for the merchandize in question at the time the action was commenced. It appeared, however, that the goods were sold as early as August 16, and that the action was not commenced until October 6; that the defendants made a credit on their books to Rosenberg's individual account prior to the latter date, although the plaintiffs repudiated that act; that on the 19th of August they reported the goods as sold, without stating that they had been paid for, but giving no reason for not remitting pursuant to request, except that "you owe us about \$900 more than the goods in question amounted to," and "we are satisfied after a little reflection you will conclude you are not entitled to any remittance."

On the other hand, one of the defendants testified: "We sold said merchandize prior to August 19, 1882. The purchaser did not keep the goods but returned them to Block & Lindheim, who resold the goods. Such resale was a final sale of the goods, and took place prior to the commencement of this action. The aggregate amount at which said goods were finally sold by our firm was \$600. Neither the firm of Block & Lindheim nor anyone on its behalf ever received anything on account of the sale of said goods prior to the commencement of this action. Whatever moneys were received by my said firm on account of the sales of said goods were received since this action was commenced. * * * We sold the goods on time and charged them on our books. We applied what we received to Rosenberg's old indebtedness. We received \$600. We made the credit on our books before the commencement of this action."

We do not think that the evidence was so conclusive as to authorize the learned trial court to withdraw from the jury the question whether the defendants had actually received the pro-

Opinion of the Court, per VANN, J.

ceeds of the goods, or whether they were by their acts estopped from denying it. While their omission to state, in their letter to the plaintiffs reporting the sale, that the goods had not been paid for is significant, we do not regard it as controlling. There is no evidence that the plaintiffs relied upon the letter or that they were misled thereby. While the jury was not bound to accept the statement of the defendant who testified, they should have been permitted to consider it and, comparing it with the facts tending to show that the goods had been paid for, to draw such inferences as in their judgment the entire evidence warranted.

The learned General Term, in its discussion of the subject, said that the action for money had and received is in its nature an equitable one, and can be maintained when it is shown that the party either has or ought to have, and therefore in law has, the money in his possession, and cited *Risdon v. De La Rue* (19 J. & S. 63; 98 N. Y. 653), as authority for the proposition. In that case the plaintiff sold a bond and mortgage to the defendant's testator, who paid therefor the entire amount of principal and agreed to pay the interest in arrear "when the same should be collected." The mortgage was subsequently satisfied by the defendant without collecting the arrears of interest, and in an action for money had and received it was held that as the defendant, who was the only one who could collect the arrears, had voluntarily and in the most formal manner, by the satisfaction of the mortgage, acknowledged the receipt of the whole amount, she must, for the purposes of that action, be taken at her word. While that case was well decided we do not regard it as analogous to this, because the defendants herein did not give a receipt stating that the goods were paid for. If this had appeared it might well be said that they either had, or ought to have had, the money.

But it is urged that as the defendants were not authorized to sell on credit, the admission of a sale by them implies a sale for cash. It is not clear from the correspondence between the parties that a sale on credit was not authorized by the plain-

Statement of case.

tiffs, but, assuming that it was not, the presumption from a simple report of sale would doubtless be that it was for cash. This presumption, however, would not be conclusive, but would be for the consideration of the jury in connection with all the evidence in the case. The plaintiffs, in their election of remedies, made choice of an action in which the fundamental fact essential to a recovery is proof that the defendants received money belonging to the plaintiffs, or to which they were entitled. (*Nat. Trust Co. v. Gleason, supra.*) While there was evidence tending to show this, as the fact could only be inferred from circumstances and there was a conflict in the testimony, a question was presented for the jury.

The plaintiffs were allowed to show by the cross-examination of the plaintiff Rosenberg, whose testimony was taken upon commission at the instance of the defendants, that his assignment for the benefit of creditors had not been attacked as fraudulent by any person or persons except the defendants. This was objected to as incompetent, irrelevant and immaterial and as calling for a conclusion, but the objection was overruled and the defendants excepted. While we have grave doubts as to the correctness of this ruling, we simply call attention to the subject without giving it further consideration as the views already expressed lead to a new trial.

The judgment should be reversed and a new trial granted, with costs to abide event.

All concur, except HAIGHT, J., not sitting.

Judgment reversed.

MARY L. TODD, Respondent, v. THE UNION DIME SAVINGS
INSTITUTION OF THE CITY OF NEW YORK, Apellant.

118	337
118	362
118	337
128	636

The record of a deed, to be effectual as evidence of a conveyance of a legal title to the land described, must, in some manner, represent that the instrument was sealed.

Without the seal, the record simply represents a conveyance of the equitable title.

When, however, the attestation clauses in aid to the deed as recorded, represent it to have been sealed, and the deed subsequently produced, or a record

Statement of case.

thereof subsequently made, shows a seal, the previous record furnishes no affirmative evidence of the absence of a seal at the time it was made, such as to require, to sustain the claim that the conveyance was duly sealed, evidence that the seal was not surreptitiously placed thereon after that record.

In an action to recover back an installment of purchase-money paid upon a contract for the sale and conveyance of a legal title by defendant to plaintiff of certain premises, the latter claimed a defect of title in that the deed under which defendant claimed was without a seal; she produced in evidence a record of the deed; the attestation clause stated the grantor had thereunto "set her hand and seal." Under the signature was the words "sealed and delivered in the presence of" P., who it appeared took the acknowledgment. There was no mark after the name of the grantors indicating a seal, but simply a dash. An employe in the register's office for many years testified that a dash was the customary mark to denote the absence of a seal when an instrument was recorded; he also testified it was the custom of the office to return a paper left for record requiring a seal and having none, if its absence was noticed. Defendant's evidence was to the effect, that, about three years after the conveyance, on application to it for a loan, secured by mortgage on the property, its counsel, discovering that no seal appeared on the record, obtained the original deed, upon which was a seal, and procured it to be again recorded; the record showing a seal. P. testified that he witnessed the execution of the deed, and took the acknowledgment, and that there was then a seal upon it; that his attention was particularly called to that fact; that when he took acknowledgments of such instruments he invariably looked to see if there were seals after the signatures. The court found that the deed was not sealed at the time of its delivery. *Held*, error; that the record as first made was simply ineffectual as evidence of the conveyance of a legal title and did not operate as a notice of such a conveyance; that the declaration of the grantor and the subscribing witnesses to the effect the deed was sealed, together with the fact when afterwards found and recorded it had a seal, required, in the absence of evidence to the contrary, the conclusion that the seal was upon it when delivered; and that no such opposing evidence was furnished by the original record.

(Argued December, 19, 1889; decided January 14, 1890.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made March 31, 1887, which affirmed a judgment in favor of plaintiff, entered upon a decision of the court on trial without a jury.

Statement of case.

On the 1st day of December, 1885, the parties entered into a contract whereby the defendant agreed to sell to the plaintiff certain premises situated in the city of New York, and on receiving payment of the consideration as therein mentioned to execute and deliver to her "a proper deed, with covenant against grantor's acts, for the conveying and assuring to her the fee simple of the said premises." The plaintiff on her part agreed to pay for them \$32,000, as follows: One thousand dollars at the time of making the contract, \$1,000 on delivery of the deed, \$10,000 by the assignment of a mortgage, and the residue by her bond secured by mortgage on the premises.

The time to complete the purchase and delivery of the deed was December 30, 1885. The plaintiff paid to the defendant the first \$1,000. This action was brought to recover it back with interest. And the plaintiff recovered accordingly.

Further facts appear in the opinion.

Wm. H. Arnoux for appellant. There is no power or authority conferred by law upon the register to record in the *libers* of conveyances any unsealed instrument, and therefore the *liber* was not competent proof of that fact. (1 R. S., 738, § 137; *Starkweather v. Martin*, 28 Mich. 471; *Chambers v. Bernescom*, 1 C. M. & R. 347; *R. v. Clapham*, 4 C. & P. 29.) The fact that the instrument is recorded under the statute conclusively establishes that it had a seal, and the court decided erroneously in finding as matter of law that the instrument was delivered without a seal. (*Starkweather v. Martin*, 28 Mich. 471; *Geary v. City of Kansas*, 61 Mo. 378; *Hedden v. Overton*, 4 Bibb. 406; *Griffin v. Sheffield*, 38 Miss. 359; *Sneed v. Ward*, 5 Dana, 187; *Smith v. Dall*, 13 Cal. 510; *F. M. Co. v. N. B. M. Co.*, 16 Nev. 302; *La Franc v. Richmond*, 5 Sawyer, 603; 2 Black. 295; *Jones v. Martin*, 16 Cal. 165.) Even if the original deed had been produced, and it had no seal, the legal presumption is that it was sealed when it was delivered, and, in absence of direct proof to the contrary, the presumption must prevail. (*In re Sandiland*, L. R. [6 C. P.] 411; *Talbot v. Hodson*, 7 Taunt, 251; 1 Sudg. on Powers, 283; Matthews on Pres. Ev.,

Statement of case.

36; Taylor on Evidence, § 128; 62 N. Y. 105; *Robinson v. Wheeler*, 25 N. Y. 252; *People v. Snyder*, 41 id. 397; *McMahon v. Harrison*, 6 id. 443.) The presumptions raised by the declarations in the deed from Ferris to Rowe that the deed was signed and sealed, the subsequent or second record of the deed made the title free from all reasonable doubt, and a marketable one. (*O. L. Home v. Thompson*, 108 N. Y. 654; Preston's note to Sheph. Touchs. 83; *Roe v. Frammarr*, 3 Smith's L. C. 1786; *Croft v. Lamley*, 5 E. & B. 648; id. 682; 6 L. H. Cas. 672; 1 W. & T. [L. C.] 277; *Wade v. Paget*, 1 Bro. C. C. 363; *Cockerell v. Cholmondeley*, 1 R. & M. 424; 1 C. & F. 60; *Briggs v. Partridge*, 64 N. Y. 357; *Williams v. Gillies*, 75 id. 197.) The court below erred in refusing to receive the evidence of Mr. Pinkney as to the declaration that Mrs. Ferris had made to him respecting the sealing of said deed by her. (Stevens on Evidence, art. 28; *Gleadow v. Atkin*, 1 C. & M. 423; *Stobart v. Dryden*, 1 M. & W. 617; *Marks v. Lahn*, 3 Bing. 408; *Highman v. Ridgway*, 10 East. 109; *Livingston v. Arnoux*, 56 N. Y. 507; *C. B. Co. v. Paige*, 83 id. 178, 192; *Taylor v. Gould*, 57 Penn. St. 152; *Hobensach v. Hollman*, 17 id. 154, 158; *Humes v. O'Bryan*, 74 Ala. 64; *Chase v. Smith*, 5 Vt. 556; *Bird v. Hueston*, 10 Ohio St. 418; *Commonwealth v. Densmore*, 12 Allen, 537; *Dwight v. Brown*, 9 Conn. 83, 92; *Webster v. Paul*, 10 Ohio St. 531, 536; *Doe v. Robson*, 15 East. 32; *Davies v. Humphreys*, 6 M. & W. 153; *Percival v. Nanson*, 7 Exch. 1; *Losee v. Losee*, 2 Hill, 609; *Doe v. Ridgway*, 4 B. & Ald. 55; *McElwee v. Sutton*, 2 Ball. 128; *Crouse v. Miller*, 10 S. & R. 155; *Van Dyke v. Thompson*, 1 Harr. 109; *Gardenshire v. Parks*, 2 Yerg. 23; *Church v. Ten Eyck*, 1 Dutch. 40; *Boylan v. Meeker*, 4 id. 294; *Wright v. Littler*, 3 Burr. 1244; *Aveson v. Lord Kinnaird*, 6 East, 195; *Doe v. Ridgway*, 4 B. & Ald. 53; *Otterson v. Hoffard*, 36 N. J. L. 129, 132; *Neely v. Neely*, 17 Penn. St. 227; *Stobart v. Dryden*, 1 M. & W. 615; 86 N. Y. 547.) This decision violates the requirements of the Revised Statutes that effect is to be given to instruments conveying an estate in land. (1 R. S. 748, § 2;

Statement of case.

Moran v. McLarty, 75 N. Y. 25; *Newton v. Pope*, 1 Cow. 110; *Loomer v. Meeker*, 25 N. Y. 361; *Ellwood v. U. F. Co.*, 45 id. 549, 554; *Wohlfahrt v. Beckert*, 92 id. 460.) As the plaintiff did not await a suit in equity to enforce the contract, but proceeded in an action at law to demand of the court the enforcement of a right, the burden of proof was upon the plaintiff to establish that the defendant's title was absolutely bad before she could be entitled to a recovery. (*Hayes v. Nourse*, 114 N. Y. 595; *Moser v. Cochran*, 107 id. 35; *O'Reilly v. King*, 28 How. Pr. 408; 2 Robt. 587; *Lyddall v. Weston*, 2 Atk. 20; *Romilly v. James*, 6 Tasvort, 263; *Burwell v. Jackson*, 9 N. Y. 542; *M. E. C. Home v. Thompson*, 20 J. & S. 321; *Bayliss v. Stimson*, 21 N. Y. 225; 1 Dart on Vend. [6th ed.] 222.) The taking of an acknowledgment by a duly authorized officer, is an act of such a character that the statements in the certificate bind the court, unless the same are impeached for fraud or duress. (*Heeter v. Glasgow*, 79 Penn. St. 79; 21 Am. Rep. 46; *Williams v. Baker*, 71 id. 476; *Kerr v. Russell*, 69 Ill. 666; *Ridgeley v. Howard*, 3 H. & McIl. 321.)

Wm. A. Boyd for respondent. The paper writing purporting to be a deed, signed by Catharine A. Ferris, to Griffith Rowe, dated December 1, 1870, did not pass the legal title to said premises, as the same was not under seal, and was therefore inoperative and ineffectual for that purpose. (3 R. S. chap. I, art. 4, §§ 137, 138; *Richards v. Boller*, 6 Daly 460; *Morse v. Salisbury*, 48 N. Y. 637; *Holliday v. Marshall*, 7 Johns. 211; *Jackson v. Wood*, 12 id. 73; *Jackson v. Wendell*, 12 id. 335; *People ex rel. v. Gillis*, 24 Wend. 201; *S. S. Bank v. S. C. Society*, 127 Mass. 516.) The burden of the proof is on the defendant to show by whom the seal was placed on the paper writing, and that the same was placed thereon by Catharine A. Ferris, or by her authority. (*Herrick v. Malin*, 22 Wend. 388; *Jackson v. Osborn*, 2 id. 555; *Smith v. McGowen*, 3 Barb. 404; *Town of Solon v. W. S. Bank*, 114 N. Y. 123-135.) The defendant contracted

Opinion of the Court, per BRADLEY, J.

to convey the said premises to the plaintiff by a good title in fee simple, and the plaintiff was not bound to accept a deed from the defendant when the defendant had no title, and the title to said premises was bad. (*Fletcher v. Button*, 4 N. Y. 396; *Hellreigel v. Manning*, 97 id. 56; *M. E. C. Home v. Thompson*, 108 id. 618.) The paper writing signed by Catharine A. Ferris did not convey a good title in fee simple, and in case the plaintiff completed her purchase, she would have a mere equitable interest. (*Grandin v. Hernandez*, 29 Hun. 397.) The plaintiff was justified in refusing to take title from the defendant under the circumstances. (*Fleming v. Burnham*, 100 N. Y. 1.) The court below was right in sustaining the objection to the question, "What was said in regard to the matter, between you and Mr. Ferris? It called upon the witness to disclose a communication made by a client to him as an attorney and so was incompetent under section 835 of the Code of Civil Procedure. (*Yates v. Olmstead*, 56 N. Y. 632; *Root v. Wright*, 84 id. 72; *Westover v. A. L. Ins. Co.*, 99 id. 56; *Merritt v. Seaman*, 6 id. 168; *Tooley v. Bacon*, 70 id. 34; *Neil v. Thorn*, 88 id. 270.)

BRADLEY, J. The alleged ground upon which this action was brought to recover back the amount of the purchase-money paid by the plaintiff is, that the defendant was not able to convey to her the title to the premises, which it undertook by this contract of sale to convey. The time for the completion of the purchase had arrived before this action was commenced. And if, as alleged, the defendant could not perform the contract on its part, the plaintiff was excused from further performance, and had the right to demand and recover the amount of the purchase-money she had paid to the defendant. (*Fletcher v. Button*, 4 N. Y. 396.) That which the defendant undertook by the contract to convey to the plaintiff, and that only, which she was required to take, was the legal title, unembarrassed by any reasonable doubt, or, in other words, it should be what is commonly understood as a marketable title. (*M. E. Church Home v. Thompson*, 108 N. Y. 618; *Fleming v. Burnham*, 100 id. 1; *Ferry v. Sampson*, 112 id. 415.)

Opinion of the Court, per BRADLEY, J.

On the first day of December, 1870, the title to the premises was in Catharine A. Ferris, who made to Griffith Rowe an instrument of that date, purporting to convey them to him. The defendant's title is dependent upon that instrument, which in terms contained the elements of a full covenant warranty deed. The ground of the alleged defect in the defendant's title, and upon which the plaintiff bases her claim to recover back the money paid, is, that the instrument so made by Mrs. Ferris was not sealed by her at the time of its delivery to Rowe. And the trial court so found.

The main question arises upon the defendant's exception to that finding of fact. If there was no evidence tending to sustain such finding, the exception was effectual to raise a question of law for review. (Code, §§ 992, 993; *Sickles v. Flanagan*, 79 N. Y. 224.) The question, therefore, arises whether there was any evidence to support the conclusion that the conveyance referred to was delivered without seal. The plaintiff seeking to recover back the money paid by her upon the contract, assumed the burden of proof to establish a defect in the title, which the defendant was able to convey, or that it was the subject of such reasonable doubt as to render it unmarketable. And for the purpose of establishing that fact, she produced the record made in the register's office of the city of New York, in liber 1160 of conveyances, January 9, 1871, which purported to be a conveyance by Mrs. Ferris to Mr. Rowe of the premises in question. Upon the left margin near the top, was represented a fifty dollar internal revenue stamp, and following the name subscribed to it was no mark of a seal, but there appeared a short horizontal dash. The attestation clause was: "In witness whereof the party of the first part has hereunto set her hand and seal, the day and year first above written;" and beneath that appeared this attestation: "Sealed and delivered in the presence of Wm. H. Post." The acknowledgement appeared by this record to have been taken by Wm. H. Post, as notary public, January 4, 1871. .

The assistant deputy register, who had been employed in

Opinion of the Court, per BRADLEY, J.

the office for over twenty years, testified that a dash was the customary mark made to denote that there was no seal on an instrument at the time of its record, and he added that it was customary in the office to return a paper requiring a seal and having none, left for record, if the absence of a seal was noticed. It does not appear that the witness had any personal knowledge of this record other than what is represented by it, nor does it otherwise than by his statement of the custom in that respect appear by whom the dash was made upon it. This constitutes the evidence on the part of the plaintiff.

It is evident that Mrs. Ferris intended to convey the property to Mr. Rowe by the instrument she made and acknowledged and that she supposed she had, because she afterwards loaned \$40,000 secured by mortgage taken by her name. And after that when the defendant contemplated such a loan to be secured by a mortgage upon the same property, the title was examined by its counsel, who, seeing that no seal appeared by the record before mentioned, sought to obtain the original deed upon which there then was no seal, which to him had no appearance other than as having been there when the deed was delivered. He caused the deed to be recorded in liber 1291 of the conveyance register's office on May 7, 1874, in which it is represented as being sealed by "[L. S.]" following the name of the person who subscribed to it. He advised the loan and it was made by the defendant, and secured by a mortgage on the property. The two records differ only in the mark of a seal on the former appearing on the former, and upon the margin of the latter in reference to the place of record of the other. J. H. Post testified that he witnessed the execution of the instrument by Mrs. Ferris, and took and certified the same, that there was a seal upon it when he did so, and that attention was particularly called to the fact that there was a seal upon this deed, and that when he took account of such an instrument he invariably looked for a seal, and that there was a seal upon it after the signature. This was fifteen years before the trial, and in view

Opinion of the Court, per BRADLEY, J.

such time had elapsed, and as he testified, he had taken quite a large number of acknowledgments of the execution of deeds made by Mrs. Ferris, whom he knew very well, there may have been some opportunity for the court to conclude that the recollection of the witness in respect to the seal of this particular deed was not entirely reliable or satisfactory. Mrs. Ferris died about two years before the trial. The original deed was not produced. Nor was the testimony given of any person who ever saw it, except that of Mr. Post and the person who as before mentioned obtained the deed and caused the record of it to be made three years after its delivery. For the conveyance of the legal title a seal to the instrument was requisite. (1 R. S. 738, § 137.) If, therefore, the instrument was not sealed, the defendant did not have such title as it had undertaken to convey to the plaintiff, although the conveyance had the effect to vest the equitable title to the premises in the party taking it, and all others succeeding to his right in that respect. The effect as evidence upon the question in this case of the record without any mark of the seal upon it, is properly and perhaps essentially the subject for consideration. The purpose of the statute providing for the record of conveyances was to preserve the evidence of them, and to furnish notice to those who might seek to acquire or might obtain some interest in real property of the condition of the title. The effect of the record is such as the statute gives to it. For the purpose of making a conveyance of record, certain formalities in verifying its execution must be observed, and they are essential to give any effect to the record, and then the record or a transcript of it duly certified may be read in evidence with the like force and effect as the original conveyance. (1 R. S. 759, § 17; Code, § 935.) The record, to be effectual as evidence of the conveyance of the legal title to the property mentioned in it, must in some manner represent that the instrument was sealed. The record as first made did not have any mark of the seal of the grantor upon it, and was, therefore, ineffectual as evidence of the conveyance of such title to the premises. Was it as evidence any more comprehensive in its effect than that? The

Opinion of the Court, per BRADLEY, J.

record of a conveyance is by the statute made admissible as evidence, and its admissibility as such is to prove a conveyance so far as its legal import is to that effect, and to that extent it also has the character of notice to subsequent purchasers, etc. The first record, by reason of the omission upon it of any mark of a seal, failed to constitute evidence of the conveyance of the legal title, or to operate as notice to that effect to others who might subsequently become interested in the property. (*Frost v. Beekman*, 1 Johns. Ch. 288; 18 Johns. 544; *Mut. Life Ins. Co. v. Duke*, 87 N. Y. 257, 263; *Shepherd v. Burkhalter*, 13 Ga. 443; 58 Am. Dec. 523; *Chamberlain v. Bell*, 7 Cal. 292; 68 Am. Dec. 260; *Halloway v. Platner*, 20 Iowa, 121; 89 Am. Dec. 517; *Taylor v. Harrison*, 47 Texas, 454; 26 Am. R. 304.)

Assuming that this first record purported to represent a conveyance within the statute (1 R. S. 762, § 38.), it did not operate as notice that the legal title to the premises was conveyed by Mrs. Ferris to Rowe. It appeared in terms to represent a conveyance of the equitable title for a consideration paid. (*Turbell v. West*, 86 N. Y. 280.) On the question whether the record was evidence that the original conveyance was not sealed, our attention is called to *Switzer v. Knapps* (10 Iowa 72; 74 Am. Dec. 375), where it was said, that "the copy of a deed without any mark indicating a seal is evidence that there was none." In that case the record relied upon to prove a conveyance and thus establish a title, gave no indication of a seal, and for that reason it was held insufficient evidence of a conveyance, and beyond that no question arose as to its character and effect as evidence. The dash appearing in the record in question, with the testimony in relation to it, adds substantially nothing material by way of evidence bearing upon the fact, whether the conveyance was sealed. The person who made the record was not produced as a witness, nor does it appear by whom or when the dash was made. The fact that it was usual or customary in the office to make such a mark, when there was no seal upon a recorded instrument, is not sufficient legitimately to produce the infer-

Opinion of the Court, per BRADLEY, J.

ence as evidence that it was in this instance made for that reason. It was no part of the record.

But when this record, essentially defective for the purpose of supporting the legal title, was shown by the plaintiff, the burden was cast upon the defendant to prove that it was able to convey such title as the contract required, or that the conveyance from Mrs. Ferris to Mr. Rowe was effectual to convey such title to the latter. This the defendant proceeded to do by proving the facts before mentioned, by which it appeared, in addition to the other evidence on the subject, that the deed, when examined three years after it was made, had upon it a seal, which is represented by the record then made. If the previous record had not been made, it would probably not be claimed that the appearance then of the seal upon the conveyance, would not have been sufficient evidence that it was there at the time of delivery. Such would have been the apparent effect. (*Ball v. Taylor*, 1 Carr & P. 417.) That situation was, and without the seal would not have been consistent with the declaration of the grantor and of the subscribing witness appearing upon the instrument, to the effect that it was sealed, which in connection with the fact that when afterwards found and recorded a seal was upon it, requires the conclusion that it was sealed at the time of delivery, unless there was some evidence interrupting the way to such conclusion. (*La Franc v. Richmond*, 5 Sawyer 603, *Starkweather v. Martin*, 28 Mich. 471; *Geary v. City of Kansas*, 61 Mo. 378; *Flowery Mining Co. v. North B. M. Co.*, 16 Nev. 302; *Jones v. Martin*, 16 Cal. 165; *In re Sandilands*, L. R. [6 C. P.] 411; *Williams v. Sheldon*, 10 Wend. 654.)

The view taken of the effect of the first record as evidence upon this question is, that it furnishes no affirmative evidence of the absence of a seal at the time it was made, requiring, for the support of the fact that the conveyance was duly sealed, evidence that the seal appearing upon it was not surreptitiously placed there after that record was made. There is no circumstance of suspicion tending in that direction, unless it arises from the omission of the mark of a seal on the record. When

Opinion of the Court, per BRADLEY, J.

the fact that there was a seal upon the conveyance appears as it did, the effect of the record in that respect was its failure to represent it as sealed, rather than as evidence that it was without seal at the time the delivery and record were made. The record failed to show that there was a seal upon the instrument at the time the record was made; and, afterward, when it was produced having a seal, the proof was that the seal was upon it at the time of delivery, and continued there.

Grantees are not supposed to examine the records to see that they are correctly made. The registry statutes, are the title deeds supposed to be correct to subsequent grantees. If the effect of records should be deemed so extended as to make the records evidence *per se* to overcome some evidence appearing in the original and not in the record, that much embarrassment might result, for the clerk and registers, to parties holding recorded conveyances, especially after they have failed to furnish any proof on the subject of the original instrument may supply.

If these views are correct, the evidence that the conveyance was sealed when delivered is not supported by any evidence. And it is represented as a deed. It follows that the finding of the court was without evidence.

The judgment should be reversed, the costs to abide the event.

All concur, except POTTER.
Judgment reversed.

Statement of case.

THE GOSHEN NATIONAL BANK, Appellant, v. WILLIAM BINGHAM,
et al., Respondents,

118 349
169 1428

WILLIAM BINGHAM, et al., Respondents, v. THE GOSHEN
NATIONAL BANK, Appellant.

The purchaser of a certified check, payable to order, who obtains title without indorsement by the payee, holds it subject to all equities and defenses existing between the original parties, although he paid full consideration, without notice.

An intention on the part of the payee and transferee to have the paper indorsed is not sufficient, at least in the absence of an express agreement to indorse; it is the act of indorsement not the intention which negotiates the instrument.

An indorsement, after notice of a defense, does not relate back to the transfer, so as to cut off the intervening rights and remedies of the party giving the notice.

A bank, by the certification of a check, represents that it has on deposit the amount, and agrees that it will retain that amount and apply it in payment, provided, however, that the check shall be indorsed by the payee.

When the check, therefore, is transferred without indorsement, the bank is not estopped by the certification from questioning the validity of the check.

Where a bank has been induced to certify a check by fraudulent representations on the part of the drawer and the check has been transferred without indorsement, an action is not maintainable on its part to recover possession of the check.

The cashier of the appellant was induced by the false representations of B. to cash a draft drawn by him, place the proceeds to his credit and certify the check of B., payable to his own order. B. presented the certified check, unindorsed, to respondents, who cashed the same. While they held the check unindorsed the appellant notified them of the fraud and demanded its return, and, they refusing, commenced an action to recover its possession. The respondents subsequently obtained the indorsement of B., and payment having been refused, brought an action to recover the amount. *Held*, that neither action was maintainable.

Watkins v. Maule (2 J. & W. 243); *Freund v. I. & T. N. Bk.* (76 N. Y. 352); *Lynch v. F. N. Bk.* (107 N. Y. 188), distinguished.

Hughes v. Nelson (29 N. J. Eq. 547), distinguished and questioned.

(Argued December 20, 1889; decided January 14, 1890.)

APPEALS from judgments rendered by the General Term of the Supreme Court in the first judicial department, entered upon orders made March 31, 1887, which affirmed a judgment

Statement of case.

in the action first above entitled in favor of defendants and a judgment in action second above entitled in favor of plaintiffs, both of which were entered upon the reports of a referee.

On November 27, 1884, Benjamin D. Brown applied to the cashier of the Goshen National Bank, appellant, at Goshen, N. Y. to cash a sight draft for \$17,000, drawn by him upon the firm of William Bingham & Co., of New York, the individual members of which firm are the respondents, accompanied by a quantity of the bonds of the West Point Manufacturing Company, of the face value of \$17,000. Brown represented that he had negotiated a sale of these bonds at their face value with William Bingham & Co.; that they had directed him to draw upon them at sight for \$17,000, the draft to be accompanied by the bonds, and that the draft would be paid upon presentation. Such representations were absolutely false. The bonds had no market value. Brown was a bankrupt and had no funds in the bank except such as resulted from the credit given him upon the faith of the draft on Bingham & Co., accompanied by the bonds. The cashier of the Goshen National Bank, relying upon such representations, cashed the draft of \$17,000, and placed the proceeds to the credit of Brown upon the books of the bank. He gave Brown sight drafts on New York for \$12,000, and certified a check drawn by Brown to his own order, dated November 26, 1884, for \$5,000. On the morning of November twenty-eight, Brown called at the office of William Bingham & Co., and stated that he wanted to get some currency. Mr. Bingham passed the check to the firm's cashier directing him to give Brown currency for the amount. The cashier gave him a check drawn on the Corn Exchange Bank for \$5,000. Brown had the check cashed at the Corn Exchange Bank. He also had the New York drafts cashed, amounting to \$12,000, which he had obtained from the Goshen National Bank. After procuring the checks and drafts to be cashed, he fled to Canada where he remained at the time of the trial of these actions. When Bingham & Co. took from Brown the check certified by the Goshen National Bank it was not indorsed.

Statement of case.

The referee found in the action second entitled that "at the time of the transfer of the said certified check by Brown to the plaintiffs, it was intended both by Brown and the plaintiffs that said certified check should be indorsed by Brown, and it was supposed by both parties that he had so indorsed it, and if the plaintiff had known that it was not indorsed they would not have paid the consideration therefor."

He found, in the action second entitled, "that Brown made no statement to the defendants, or either of them, at the time of the transfer of the check that such check was indorsed."

And "prior to the commencement of the action of replevin the defendants never requested Brown to indorse said check."

While Bingham & Co. held the check in question undorsed, a demand for its return to the bank, accompanied by a full explanation of the circumstances under which the certification was obtained, was made upon Bingham & Co., in behalf of the bank, and upon their refusal to return it, an action to recover its possession was commenced by the bank against Bingham & Co.

That action is, firstly, above entitled.

Subsequently, and on December sixteenth, Bingham & Co. obtained from Brown a power of attorney to indorse the check. Pursuant thereto the check was indorsed and payment thereafter demanded of the bank.

This was refused, and thereupon the action, secondly, above entitled, was commenced by Bingham & Co., to recover the amount of the check.

Henry Bacon for appellant. The bank by certifying the check drawn by Brown to his own order became liable thereon as the principal debtor. (*Bank of Washington v. Whitman*, 94 U. S. 343; *F., etc., Bank v. B. & D. Bank*, 14 N. Y. 623; 16 id. 125; *Meads v. M. Bank*, 25 id. 143; *Clafflin v. F., etc., Bank*, 25 id. 293; *F., etc., Bank v. B. & D. Bank*, 28 id. 425; *S. Bank v. N. Bank*, 67 id. 458; *People v. Howell*, 4 Johns. 296; *Schoonmaker v. Roosa*, 17 id. 301; *Slade v. Halstead*, 7 Cow. 322; *Morton v. Rogers*, 14 Wend.

Statement of case.

576; *Cook v. S. N. Bank*, 52 N. Y. 96, 115, 116; Story on Bills, § 187; Story on Prom. Notes, § 190.) Bingham & Co. having taken this certified check without having or requiring an indorsement of it by Brown held it subject to all the defenses and equities existing between the original parties. (*Harrop v. Fisher*, 30 L. J. 283; *Calder v. Billington*, 15 Me. 398; *Osgood v. Artt*, 17 Fed. Rep. 575; *Trust Co. v. Nat. Bank*, 101 U. S. 568; *F. Bank v. Raymond*, 3 Wend. 69; *Hedges v. Seeley*, 9 Barb. 214; *Raynor v. Hoagland*, 7 J. & S. 11; 64 N. Y. 630; *Muller v. Pondir*, 55 id. 325; *Freund v. I. & T. Bank*, 76 id. 352; *Best v. S. M. Co.*, 105 id. 59; *Lynch v. F. Nat. Bank*, 107 id. 179.) The indorsement by Brown subsequently procured after full notice and actual knowledge of the fraud perpetrated by Brown in obtaining the certificate, does not make Bingham & Co. *bona fide* holders for value without notice. (Story on Prom. Notes, § 120; *L. Nat. Bank v. Taylor*, 100 Mass. 18; *Gilbert v. Sharpe*, 2 Lans. 412; *Harrop v. Fisher*, 30 L. J. 283; *Whistler v. Foster*, 14 C. B. [N. S.] 246; *Savage v. King*, 17 Me. 301; *Haskill v. Mitchell*, 53 id. 468; *Clark v. Whitaker*, 50 N. H. 474; *Clark v. Callison*, 7 Bradw. 263; Story on Bills, § 201; *Harrop v. Fisher*, 30 L. J. 283.) The bank is not estopped from asserting its rights to, and defenses against, this check by reason of its certificate. (*Clark v. Whitaker*, 50 N. H. 474; *M. Bank v. N. Y. & N. H. R. R. Co.* 13 N. Y. 597, 638; *Clark v. Sisson*, 22 id. 312; *Bush v. Lathrop*, 22 id. 535; *Moore v. M. Bank*, 55 id. 41; *Fairbanks v. Sargent*, 104 id. 108; *Morse v. M. Bank*, 55 id. 41; *Crawford v. Lockwood*, 9 Hun, 547; *Shapely v. Abbott*, 42 N. Y. 443; *Wilcox v. Howell*, 44 id. 443.) It was unnecessary for the bank in order to maintain its contention in these actions to allege or prove any return, or offer to return, to Brown these bonds given to it as collateral to his draft on Bingham & Co. (*Pearse v. Pettitts*, 47 Barb. 276; *Storms v. Austin*, 1 Metc. 557; 86 N. Y. 81; *Hynes v. Patten*, 28 Hun, 528; Benjamin on Sales, § 446.) The bank had the right to maintain an action of claim and delivery for the

Opinion of the Court, per PARKER, J.

Gardener v. Pullen, 2 Vern. 394; *Boardman v. L. S., etc., R. R. Co.*, 37 N. Y. 157; *Evans v. Wood*, L. R. [5 Eq. Div.] 9; *Paine v. Hutchinson*, L. R. [3 Ch. App.] 547; *Hughes v. Nelson*, 20 N. J. Eq. 547; 1 Story's Eq. Juris., § 99b; *Bacon v. Cohen*, 12 Sm. & M. 516, 525; *Walker v. Maule*, 2 Jac. & W. 237; Code, § 1207; *Barlow v. Scott*, 24 N. Y. 40; *Armitage v. Pulver*, 37 id. 494; *Smith v. Pickering*, Peake N. P. 69; *Wallace v. Hardacre*, 1 Camp. 45, 47; *Anonymous*, id. 492; *Baker v. Arnold*, 3 Caines, 279, 284; *Watkins v. Maule*, 2 Jac. & W. 237.) The bank is estopped by its certification to dispute its liability on the check. (*M. Bank v. S. Bank*, 10 Wall. 604, 647; U. S. R. S., § 5208; Bigelow on Estoppel [3d ed.], 388; *Freund v. I. & T. Bank*, 76 N. Y., 352; *Moore v. M. N. Bank*, 55 N. Y. 41, 47; *Simson v. Bank of Commerce*, 43 Hun, 156.) None of the exceptions to evidence were well taken. (*McKown v. Hunter*, 30 N. Y. 625; *Bedell v. Chase*, 34 id. 386.) The exceptions to the refusal to make the additional conclusions of law were not well taken. (*Moody v. Osgood*, 54 N. Y. 488; *Priebe v. K. B. Co.*, 77 id. 597.)

PARKER, J. As against Brown, to whose order the check was payable, the bank had a good defense. But it could not defeat a recovery by a *bona fide* holder to whom the check had been indorsed for value. By an oversight on the part of both Brown and Bingham & Co. the check was accepted and cashed without the indorsement of the payee. Before the authority to indorse the name of the payee upon the check was procured and its subsequent indorsement thereon, Bingham & Co. had notice of the fraud which constituted a defense for the bank as against Brown. Can the recovery had be sustained?

It is too well settled by authority, both in England and in this country, to permit of questioning, that the purchaser of a draft, or check, who obtains title without an indorsement by the payee, holds it subject to all equities and defenses existing between the original parties, even though he has paid full consideration, without notice of the existence of such equities

...



Opinion of the Court, per PARKER, J.

ment, not the intention, which negotiates the instrument, and it cannot be said that the intent constitutes the act.

The effect of the indorsement made after notice to Bingham & Co. of the bank's defense must now be considered. Did it relate back to the time of the transfer, so as to constitute the plaintiff's holders by indorsement as of that time?

While the referee finds that it was intended both by Brown and the plaintiffs that the check should be indorsed, and it was supposed that he had so indorsed it, he also finds that Brown made no statement to the effect that the check was indorsed; neither did the defendants request Brown to indorse it. There was, therefore, no agreement to indorse. Nothing whatever was said upon the subject. Before Brown did agree to indorse the plaintiffs had notice of the bank's defense. Indeed, it had commenced an action to recover possession of the check.

It would seem, therefore, that having taken title by assignment, for such was the legal effect of the transaction, by reason of which the defense of the bank against Brown became effectual as a defense against a recovery on the check in the hands of the plaintiffs as well, that Brown, and Bingham & Co., could not, by any subsequent agreement or act, so change the legal character of the transfer as to affect the equities and rights which had accrued to the bank. That the subsequent act of indorsement could not relate back so as to destroy the intervening rights and remedies of a third party.

This position is supported by authority. (*Harrop v. Fisher*; *Whistler v. Forster*; *Savage v. King*; *Haskell v. Mitchell*; *Clark v. Whitaker*; *Clark v. Callison*; *Lancaster Nat. Bank v. Taylor*; *Gilbert v. Sharp*, cited, *supra*.)

Watkins v. Maule (2 Jac. & Walk. 243) and *Hughes v. Nelson* (29 N. J. Eq. 547) are cited by the plaintiff in opposition to the view we have expressed.

In *Watkins v. Maule*, the holder of a note, obtained without indorsement, collected it from the makers. Subsequently the makers complained that the note was only given as a guarantee to the payee who had become bankrupt. Thereupon the

Opinion of the Court, per PARKER, J.

holder refunded the money and took up the note upon the express agreement that the makers would pay any amount which the holders should fail to make out of the bankrupt payee's property. The makers were held liable for the deficiency. *Hughes v. Nelson* did not involve the precise question here presented. The views expressed, however, are in conflict with some of the cases cited but we regard it in such respect as against the weight of authority. *Freund v. Importers & Traders' Bank* (*supra*) does not aid the plaintiff. In that case it was held "that the certification by the bank of a check in the hands of a holder who had purchased it for value from the payee, but which had not been indorsed by him, rendered the bank liable to such holder for the amount thereof. By accepting the check the bank took, as it had a right to do, the risk of the title which the holder claimed to have acquired from the payee. In such case the bank enters into contract with the holder by which it accepts the check and promises to pay it to the holder, notwithstanding it lacks the indorsement provided for, and it was accordingly held that it was liable upon such acceptance upon the same principles that control the liabilities of other acceptors of commercial paper." (*Lynch v. First National Bank of Jersey City*, 107 N. Y. 183.) But one question remains.

The learned referee held, and in that respect he was sustained by the General Term, that the bank by its certification represented to every one that Brown had on deposit with it \$5,000; that such amount had been set apart for the satisfaction of the check, and that it should be so applied whenever the check should be presented for payment, and that Bingham & Co., having acted upon the faith of these representations and having parted with \$5,000 on the strength thereof, the bank is estopped from asserting its defense.

The referee omitted an important feature of the contract of certification. The bank did certify that it had the money; would retain it and apply it in payment, *provided* the check should be indorsed by the payee. (*Lynch v. First National Bank of Jersey City, supra*).

Statement of case.

If the check had been transferred to plaintiffs by indorsement the defendant would have had no defense, not because of the doctrine of estoppel, but upon principles especially applicable to negotiable instruments. (*Mechanics' Bank v. N. Y. & N. H. R. R. Co.*, 13 N. Y. 638.)

If the maker or acceptor could ever be held to be estopped by reasons of representations contained in a negotiable instrument he certainly could not be in the absence of a compliance with the provisions upon which he had represented that his liability should depend.

But it is well settled that the maker or acceptor of a negotiable instrument is not estopped from contesting its validity, because of representations contained in the instrument. In such cases an estoppel can only be founded upon some separate and distinct writing or statement. (*Clark v. Session*, 22 N. Y. 312; *Bush v. Lathrop*, 22 id. 535; *Moore v. Metropolitan Bank*, 55 id. 41; *Fairbanks v. Sargent*, 104 id. 108; *Mechanics' Bank v. N. Y. & N. H. R. R. Co.*, *supra*.)

The views expressed especially relate to the action of Bingham & Co. against the bank and call for a reversal of the judgment.

We are of the opinion that the action brought by the bank against Bingham & Co. to recover possession of the check cannot be maintained and in that case the judgment should be affirmed.

All concur, except HAIGHT J., not sitting.

Judgments accordingly.

GRACE E. KURSHEEDT et al., Respondents, v. UNION DIME SAVINGS INSTITUTION OF THE CITY OF NEW YORK, Appellant.

It seems, a judgment in a foreclosure suit under the Code of Procedure (§ 123, as amended in 1856 and 1862) is effectual to bar the right of redemption of a grantee not made a party, whose deed was subsequent to the mortgage and prior to the commencement of the foreclosure suit, but was not recorded until after the filing of *lis pendens*; at least where the plaintiff in such action had no actual notice at the time of its commencement of the unrecorded deed.

Statement of case.

It was contemplated by the provisions of the Code of Procedure in reference to filing, *lis pendens* (§ 132; see, also, Code of Civ. Pro. §§ 1670, 1671), that those, whose conveyances or incumbrances appear by the record, should be made parties in order to charge with the result of the action, those holding under or through them not made parties, whose interests do not so appear at the time of such filing.

While, where the mortgagor has conveyed his interest, he is not a necessary party to the foreclosure; if he is not made a party, it is necessary to make one deriving title or interest from him, subsequent to the mortgage, a party in order to bar his right of redemption.

For the purpose, therefore, of charging subsequent grantees or incumbrancers not made parties, the fact that the mortgagor has conveyed the property does not obviate the necessity of serving the summons and complaint upon him, and charging him by the decree.

In an action to foreclose a mortgage, brought under the Code of Procedure, the mortgagor was made a party, but was not served with the summons and complaint. S., a defendant, who was served, appeared and answered, setting up and proving a conveyance from the mortgagor of his equity of redemption, executed before the commencement of the foreclosure suit, but not recorded, and of which it did not appear the plaintiff therein had notice at the time said action was commenced. S. at that time was married; his wife was not made a party. In an action by a purchaser from one who claimed title under a deed on sale under judgment in the foreclosure suit, to recover back the purchase-money paid, *held*, that, as the mortgagor was not served, the right of dower of the wife of S. was not cut off by the foreclosure; that the fact that her husband was a party defendant did not operate to bar or defeat her right of redemption; that, therefore, the vendor was not able to convey a marketable title free from reasonable doubt, which in contemplation of the parties was to be conveyed in performance of the contract; and that plaintiff was entitled to recover.

A wife's inchoate right of dower is not derived from her husband, but it vests at the moment of the grant to her husband and she takes it constructively as purchaser from the grantor.

(Argued December 20, 1889; decided January 21, 1890.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made March 31, 1887, which affirmed a judgment in favor of plaintiffs, entered on a decision of the court on trial at Special Term.

The nature of the action and facts are sufficiently stated in the opinion.

Statement of case.

Wm. H. Arnoux for appellant. Mrs. Sanford is a subsequent incumbrancer, and is barred by the proceedings subsequent to the filing of the *lis pendens*. (Old Code, § 132; *Ostrom v. McCann*, 21 How. 431; *Fuller v. Scribner*, 76 N. Y. 190; 16 Hun, 130; *Cleveland v. Boreum*, 24 N. Y. 622.) The title of the defendant to the premises in question was free from any and all defects and was a good, valid and marketable title. (*Mosher v. Cochrane*, 107 N. Y. 35; *Schermerhorn v. Niblo*, 2 Bosw. 161.)

M. A. Kursheedt for respondent. By the Revised Statutes of this state the legal title to real estate cannot pass except by an instrument under seal. (1 R. S. 738, § 137; *Warren v. Lynch*, 5 Johns. 239; *Jackson v. Wood*, 12 id. 73; *Jackson v. Wendell*, Id. 355; *Morse v. Salisbury*, 48 N. Y. 643; *Baird v. Mayor, etc.*, 96 id. 567-577; *Sherwood v. Hauser*, 94 id. 626; 2 R. S. 404, § 62; *Rochard v. Boller*, 6 Daly, 460; *Bk. of Rochester v. Gay*, 2 Hill, 227; *Coit v. Milliken*, 1 Denio, 376; *Town of Solon v. W. S. Bk.*, 114 N. Y. 132; L. R. [6 C. P.] 411; *Switzer v. Knapps*, 10 Iowa, 72; *McCoy v. Cassidy*, 96 Mo. 429, 433; *Williams v. Bass*, 22 Vt. 352; *Switzer v. Knapp*, 10 Iowa, 75; *Herrick v. Malin*, 22 Wend. 388; *Jackson v. Osborn*, 2 id. 555; *Smith v. McGowan*, 3 Barb. 404.) A purchaser is entitled to more than a mere equitable title to real estate which he has contracted to buy. The defendant in this case expressly agreed to give the plaintiffs a proper deed for the conveying and assuring to them the fee simple of said premises. The defendant does not comply with this contract by simply transferring the right to bring a law suit to obtain a conveyance. (*Fletcher v. Button*, 4 N. Y. 396; *Burwell v. Jackson*, 9 id. 535; *S. F. C. S. Bk. v. S. C. Society*, 127 Mass. 516; *Shriver v. Shriver*, 86 N. Y. 575; *Fleming v. Burnham*, 100 id. 1, 10; *Adams v. Valentine*, 33 Fed. Rep. 1; *Abbott v. James*, 111 N. Y. 673; *McPherson v. Smith*, 49 Hun, 254; *Jordon v. Poillon*, 77 N. Y. 518; *Jeffries v. Jeffries*, 117 Mass. 184; *M. E. C. Home v. Thompson*, 108 N. Y. 618; *Uhl v. Loughran*, 2 N.

Y. Supp. 190.) Mrs. Sanford was action, and as she holds an inchoa redeem from the mortgage. (*Whe Mills v. Van Voorhies*, 20 N. Y. 100, § 44; *M. Bk. v. Thomson*, 51 *Voorhies*, 22 id. 412; *Bell v. Ma Denton v. Nanny*, 8 Barb. 618; 1 524, 529; *Hitchcock v. Harrington Torry*, 7 id. 278; *Kittle v. Van Taggart v. Rogers*, 49 Hun, 265; B Code Civ. Pro., §§ 379, 444; Laws Laws of 1877, chap. 318; *Hayden Butler v. Tomlinson*, 38 Barb. 6 N. Y. 190; *Lamont v. Cheshire*, 61 5 Duer, 666; Freeman on Judgmen of John M. Pinckney excluded was Civ. Pro., § 835; *Eastman v. Kelly ris v. Cain*, 1 South Rep.; Code C v. *Ætna Life Ins. Co.*, 99 N. Y. 6 N. Y. Supp. 398; *Tooley v. Bac*

BRADLEY, J. The purpose of t back the purchase-money paid by th ant upon a contract, whereby the convey to them certain land situated and the alleged ground of the claim unable to convey to the plaintiffs entitled to under the contract. Th which the defendant claims to have, by one Rowe from Catharine A. Fe the first day of December, 1870, when Rowe. That conveyance also cover ant by contract undertook to sell who also brought an action against back purchase-money.

The proposition, urged on the pa action, that the title taken by the de

Opinion of the Court, per BRADLEY, J.

the alleged ground that the deed from Ferris to Rowe was not sealed, has, at the present term of this court, been determined in *Todd v. U. D. S. Inst.*,* this defendant upon the same evidence as that presented by the record here, adversely to the plaintiffs, and therefore will have no further consideration on this review.

There is, however, a further question in the present case, which requires consideration. In May, 1874, one Clark, claiming to be the owner of the premises, made to one Clapp a mortgage upon them to secure the payment of \$22,000, according to the condition of a bond made by the mortgagor to mortgagee, which bond and mortgage were duly assigned by Clapp to the defendant, and that afterwards, and in July, 1874, the defendant brought an action to foreclose the mortgage and filed with the proper clerk the summons and complaint with a notice of the pendency of the action. The mortgagor, Clark, and one Thomas L. Sanford were named as defendants in the foreclosure action. The summons was in no manner served upon Clark, nor did he appear in the action. Sanford appeared and defended, and, amongst other matters, alleged a conveyance of the premises by Clark to him. The fact was that he had a deed to that effect in his possession at the time of the commencement of that action. It was not then recorded, nor was the defendant then advised that such a deed had been made. But at the time of the commencement of that action Sanford had a wife, Delia A. Sanford, who was not made a party therein. The question arises whether, in view of the fact that Clark was not served, the omission to make Mrs. Sanford a party defendant in the foreclosure action rendered the judgment in that action ineffectual to bar her inchoate right of dower. Such would have been the effect if Clark had been served with the summons or had appeared in the action. (Old Code, § 132; *Fuller v. Scribner*, 76 N. Y. 190.) This is on the permitted assumption (without considering the effect if otherwise) that the savings institution was in no manner charged with notice of the conveyance to Sanford at the time of the commencement of that action. Assuming

* See *ante*, page 337.

Opinion of the Court, per BRADLEY, J.

that Clark had conveyed his interest in the property, he was not a necessary party to the action of foreclosure, but, if the action had been brought and prosecuted upon that assumption, it was necessary to make those deriving any title or interest in it from his conveyance parties defendant. Prior to the Code, the failure to record a conveyance made subsequently to a mortgage and prior to the commencement of an action for its foreclosure or filing *lis pendens*, did not obviate the necessity of making such subsequent grantee a party defendant to bar his right of redemption. Those not made parties, and thus affected by the judgment, were purchasers and incumbrancers who became such *pendente lite*. (*Haines v. Beach*, 3 John. Ch. 459; *Hayden v. Buckler*, 9 Paige, 512; *Butler v. Tomlinson*, 38 Barb. 641.)

The provisions of the Code so modified the rule as to make the action and its result effectual as against subsequent purchasers and incumbrancers, whose conveyances are not recorded at the time of filing the notice of pendency of the action. This may not be the rule when a plaintiff in such action has actual notice of the unrecorded incumbrance at the time of its commencement. (*Lamont v. Cheshire*, 65 N. Y. 30.) There is no occasion here to consider that question. It was contemplated by the provisions referred to of the Code, that those whose conveyances or incumbrances appear by the record should be made parties in order to charge, with the result of the action, those holding under them not made parties, whose interests do not so appear of record at the time of filing such notice. That is to say, that the latter should be barred by charging the former as defendants in the action. The fact, therefore, that Clark had conveyed the property, did not, for that purpose, obviate the necessity of serving him with the summons and charging him by the decree and thus, through him, by that means to bind any person not made a party, who had by his unrecorded conveyance taken any right relating to the title to the premises. It may be assumed that the notice was duly filed, representing Clark as a party defendant, but that of itself was ineffectual to bar Mrs. Sanford's

Opinion of the Court, per BRADLEY, J.

right of redemption, if she took any such right through or by means of the conveyance. Such result was dependent upon effectuating the proceedings in the action against him as a party defendant. Without accomplishing such a result, he was in practical effect no more a party than he would have been if his name, as such, had not appeared in the summons. The grantee, Sanford, in the conveyance made by Clark was served, and so far as he was concerned the failure to serve Clark had no importance, and its only consequence has relation to Mrs. Sanford, and the effect of the foreclosure action, the decree and its execution, if executed, upon her alleged inchoate right of dower in the premises. Assuming, as we may for the purposes of this review, that such right existed when the foreclosure action was commenced, it was the subject of her protection by means of defense or any other adequate remedy until lawfully barred. (*Mills v. Van Voorhies*, 20 N. Y. 412; *Simar v. Canaday*, 53 N. Y. 298; *Denton v. Nanny*, 8 Barb. 618.)

The right of dower is not derived from the husband. It is a right at common law, and arises by reason of the marriage, and by operation of law. It is a right which attaches on the land when the seizin and the marriage relation are concurrent. And such is the effect of the statute. (1 R. S. 740, § 1.)

When it was essential, under an early statute of this state, to determine the relation of the wife to the grant made of land to her husband, it was held that the wife's inchoate right of dower vested at the moment of the grant to the husband; and that she took such right, constructively, as purchaser from the grantor. (*Sutliff v. Forgey*, 1 Cow. 89; 5 id. 713; *Priest v. Cummings*, 20 Wend. 350; *Connolly v. Smith*, 21 id. 61; *Lawrence v. Miller*, 2 N. Y. 251.)

And inasmuch as Mrs. Sanford did not derive her inchoate right of dower from her husband, the fact that he was a party defendant to the foreclosure action, did not operate to bar or defeat her right of redemption. In view of the apparent situation arising from the failure to bar this alleged right of Mrs. Sanford, the title which the defendant was able to con-

Statement of case.

vey to the plaintiffs was not free from reasonable doubt and was not a marketable title which, in the contemplation of the parties, was to be conveyed in performance of the contract.

The judgment should be affirmed.

All concur, except POTTER and HAIGHT, JJ., not sitting.

Judgment affirmed.

COLLIS P. HUNTINGTON, Respondents v. HENRY G. ATTRILL et al., Appellants.

118	365
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127	469
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147	825
118	365
151	66

In an action against an officer of a corporation, incorporated under the act of 1875 (Chap. 611, Laws of 1875), providing for the organization of certain business corporations, to enforce the liability for a debt of the corporation imposed by said act (§ 21), because of the signing of a certificate or report false in a material representation it is not necessary to show knowledge on the part of the officer at the time of signing; proof that the writing is untrue, "in any material representation" is sufficient.

The provision of said act giving such remedy, is not violative of the constitution.

On trial of such an action the jury are not required to give the defendants the benefit of any reasonable doubt, in the sense applicable to criminals; but may govern their action in reaching a result by the fair preponderance of evidence.

The "fair value" contemplated by the provision of said act (§ 14), prohibiting the issuing of stock, of a corporation organized under it, for property, except for "property actually received for the use and legitimate purpose of said corporation, at its fair value" is that which the property has at the time of the sale; it is not dependent upon the subsequent success or failure of the investment, further than that result may have been legitimately within evidential contemplation at the time of the sale, in view of the uses for which it may have had available advantages within itself.

In an action under said act, against directors of a corporation organized under it, the alleged false representation was that the whole capital stock, \$700,000, had been fully paid in. The object of the corporation, as stated in its certificate of organization, was the purchase of lands and building thereon a seaside hotel, bath-houses, etc. It appeared that the whole stock was issued to A., one of the defendants, in payment for 120 acres of land on the sea shore which was conveyed, subject to a mortgage of \$72,000, the payment of which was assumed by the company.

Statement of case.

This land was part of 140 acres purchased by A. six months before the organization of the company, and in contemplation thereof, for \$80,000, of which he paid \$8,000 and gave the said mortgage to secure the balance. The defendants were directors of the company at the time of the conveyance of the property to it. The land had no known market value at that time, or intrinsic value of large amount, disconnected from a purpose to make a use of it such as was contemplated. Defendants offered evidence on the question of value, based upon comparison with other sea-side property at different places, which was objected to and excluded. *Held*, no error.

Opinions of witnesses as to value, founded solely upon transactions in other property along the coast, not in the vicinity of that in question, was excluded. *Held*, no error.

Defendants counsel asked the court to charge that by the words "at its fair value" in said act was meant "the fair value of such property for the uses and purposes of the company in the conduct of its legitimate business, and not the actual market value or the actual intrinsic value thereof at the time it is acquired." In response the court stated it knew of no value other than intrinsic or market value, and then charged that the jury had the right to consider, in determining the fair value, its value for the use to which it was to be put and the adaptability of it to any specific purpose; that these are constituent elements of intrinsic value and although the value to be ascertained was at the time of the sale, any peculiar advantages, known or unknown, and which, even if known, would make it advantageous to a few only, properly entered into the consideration. *Held*, no error.

The debt which plaintiff sought to recover was a loan negotiated by S., the manager of the company, for which he gave his own note, payable to its order and indorsed by him in the name of the company, giving as collateral, mortgage bonds of the company. Defendants disputed the authority of S. to make the loan and claimed the debt was not that of the company. Plaintiff was permitted to prove entries in the books of the corporation in relation to the loan. *Held*, no error; that the evidence was competent to show the company had the benefit of the loan, as bearing upon the question as to whether it was its debt.

In response to a request by defendants to charge that before a verdict could be found for plaintiff the jury must be satisfied by affirmative proof that S. was authorized to indorse the name of the company, by prior resolution of the executive committee or board of directors or by ratification, by resolution, or some equivalent act, the court charged that the jury must find either prior authority, or subsequent ratification, which could be evidenced by general course of business as well as by resolution. *Held*, no error.

Plaintiff was permitted to prove, on the question of value, that the land purchased, with extensive improvements thereon, was afterwards sold at judicial sale for \$175,000. *Held*, no error.

Statement of case.

It seems that officers assuming the responsibility and charged with the duties of the management of the business of a corporation are chargeable with knowledge as to matters which are open to observation and legitimately subject to their inspection and control.

Schenck v. Andrews (57 N. Y. 133); *Boynton v. Andrews* (63 N. Y. 93); *Douglass v. Ireland* (73 N. Y. 100); *Pier v. Hanmore*, (86 N. Y. 95); *Bonnell v. Griswold* (89 N. Y. 122), distinguished.
Reported below (42 Hun, 459).

(Argued December 6, 1889; decided January 28, 1890.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made December 14, 1886, which affirmed a judgment in favor of plaintiff entered upon a verdict.

The nature of the action and the facts are sufficiently stated in the opinion.

James C. Carter for Henry Y. Attrill appellant. The act of 1875, and prior statutes of the same character, are not within the lawful exercise of legislative power and are void. (*Veeder v. Baker*, 83 N. Y. 156; *Morawetz on Corp.* [2d ed.], §§ 907, 908, 909; *Mitchell v. Hotchkiss*, 48 Conn. 9; *Garrison v. Howe*, 17 N. Y. 458; *M. Bank v. Bliss*, 35 id. 412; *Jones v. Barlow*, 62 id. 202; *Bruce v. Platt*, 80 id. 379; *Pier v. Hausman*, 86 id. 95, 106; *Arthur v. Griswold*, 55 id. 400; *Bonnell v. Griswold*, 80 id. 128; *Bonnell v. Blake*, 89 id. 122; Constitution, art. 1, § 5; *O. & M. R. R. Co. v. Luckey*, 78 Ill. 55; *Fletcher v. Peck*, 5 Cranch. 135; *Wynehamer v. People*, 13 N. Y. 378-390; *In re L. & Co. Bank*, 20 id. 9; *Crawford v. Lockwood*, 9 How. Pr. 547; *Cooley on Const. Lim.* [5th ed.] 216.) If the twenty-first section of the act of 1875 is to be interpreted, as the Supreme Court has in a recent decision (*Torbett v. Eaton*, 49 Hun, 209), interpreted it, namely, as imposing the penalty in case the report happens to be in fact *untrue*, however honestly the signers may have believed it to be true, the objection of constitutionality would scarcely need argument, but the interpretation is erroneous. (Abbott's L. Dict., 478; *Schenck v. Andrews*, 57 N. Y. 133; *Boynton v. Andrews*, 63 id. 93.) It is submitted that the false report or certificate

Statement of case.

mentioned in the twenty-first section of this act means one which is fraudulently false; that is to say, not merely one which is untrue to the knowledge of the party signing it, but one which was made for some affirmative fraudulent purpose. (Kerr on Fraud [2d Eng. ed.], 3-5, 16-19; *Pier v. Hanmore*, 86 N. Y. 95; *Bonnell v. Griswold*, 85 id. 122.) Grave errors were committed in the admission and exclusion of evidence as to value of the property. *Reed v. R., W. & O. R. R. Co.*, 48 Hun, 231; *Sthurm v. Williams*, 6 J. & S. 325.) There was no evidence given which would furnish any just support for the finding that the defendants knew that the certificate was untrue and the defendants' motion to dismiss the complaint, or to direct a verdict in their favor, should have been granted. (*Boynton v. Andrews*, 63 N. Y. 93; *Bonnell v. Griswold*, 89 id. 122.) The plaintiffs were permitted to prove, and this by hearsay evidence derived from the books of the company, what its indebtedness was, both at the time of the issue of stock (April 27, 1880), and also at the time of the filing of the report (July 1, 1880). A two-fold error was thus committed. The fact sought to be proved was immaterial, but dangerously calculated to mislead; and the evidence was incompetent to prove the fact. (Whart. on Ev. [3d ed.] § 662; *Mudgett v. Howell*, 33 Cal. 25; *Blake v. Griswold*, 103 N. Y. 429, 435; Taylor on Ev., § 1781; 3 R. S. 738.) The refusal of the court to charge that the jury must find that they had knowingly and intentionally overvalued the property, and that they must find that they dishonestly and fraudulently overvalued it was error. (*Pier v. Hanmore*, 86 N. Y. 95; *Bonnell v. Griswold*, 89 id. 122.) The court erred in refusing to charge that, if the jury possibly believed that the statements of the reports were true, they should find a verdict for the defendants, and in stating that the plaintiffs could sustain the burden of proof imposed upon them by "a fair preponderance of evidence." (Whart. Crim. Ev. § 330; *N. Y. G. Co. v. Gleason*, 7 Abb. [N. C.] 334, 357.)

Coles Morris for Henry Y. Attrill appellant. There was a total failure of competent evidence, as against these defend-

ants, to prove any cause of action in
 Rockaway Beach Improvement Cor-
 poration, *Edm. S. C. 470*; Code Civ.
v. Fant, 50 N. Y. 474.) The mot-
 ion to set aside the verdict or to direct a verdict for the
 defendant was made at the close of the case, sh-
 (Baulec v. N. Y. & H. R. R. Co., 50
Ward, 8 C. B. [N. S.], 568; *Hayes*
 N. Y. 259; *Dwight v. G. L. Ins*
Schwinger v. Raymond, 105 id. 6-
 85 id. 464; *Morris v. Talcott*, 96 id.
 Eng. Ecc. R. 371, 391; *Pollock*, v.
 The court below erred in allowing the
 after the failure of the company, to
 with the hotel on it, which had cost
 at auction for \$175,000. (*Schenck v.*
 It was error to exclude either of the
 Mr. Attridge to show that he acted
 in making the certificate, which is the
 (*Seymour v. Wilson*, 14 N. Y. 567;
 id. 139; *Cortlandt County v. Herkin-*
Starin v. Kelly, 88 id. 418.) In a case
 main facts necessary for the plaintiff
 upon the evidence on behalf of the
 upon the whole case, the jury could
 against the defendants, and their verdict could not
 as against the evidence or the weight
 that such errors cannot be overlooked
 (*N. Y. G. & I. Co. v. Gleason*, 78 N.
Crego, 7 N. Y. Supl. 86; *Shultz v. H.*
Morris v. Talcott, 96 id. 100; *Green*
Stokes v. People, 53 id. 183; *Smith v.*
 630, 639.)

Delos McCurdy for William R. S.
 complaint alleges that "each of the
 signed and verified said certificate and

Statement of case.

recorded, knew the same was false" in the particulars stated in the complaint. This was a necessary allegation; and in order to maintain the action it was incumbent upon the plaintiff to prove affirmatively facts requisite to support this allegation of the complaint. (Laws of 1848, § 12; Laws of 1875, § 21; *Bruce v. Platt*, 80 N. Y. 379; *Garrison v. Howe*, 17 id. 458; *Miller v. White*, 50 id. 137; *W. A. Co. v. Barlow*, 63 id. 62; *Chase v. Curtis*, 113 U. S. 452-463; *Stokes v. Stickney*, 96 N. Y. 323; *Knox v. Baldwin*, 80 id. 610; *Pier v. George*, 86 id. 613; *Stevens v. Fox*, 83 id. 313; *Veeder v. Baker*, Id. 156; *Easterly v. Barber*, 65 id. 252; *Wales v. Suydam*, 64 id. 173; *Pier v. Hanmore*, 86 id. 95-103; *Bonnell v. Griswold*, 89 id. 126; *L. S. I. Co. v. Drexel*, 90 id. 92; *Douglass v. Ireland*, 73 id. 100; *Brockway v. Ireland*, 61 How. Pr. 372; *Schenck v. Andrews*, 57 N. Y. 133; *Boynnton v. Andrews*, 63 id. 93; *Pier v. George*, 17 Hun, 207; *Bonnell v. Griswold*, 68 N. Y. 294; *Thurber v. Thompson*, 21 Hun, 474; *Wakeman v. Dalley*, 51 N. Y. 27-35; *Oberlander v. Speiss*, 45 id. 175; *Myer v. Ammidown*, 45 id. 169; *Marsh v. Falker*, 40 id. 562.) It was manifest error on the part of the learned trial judge to restrict the jury to a determination of the value of the land on the 10th of April, 1880, when Attrill conveyed it to the company, and to exclude from the jury all other considerations affecting its value, or which might fairly influence the judgment of those engaged in the enterprise as to its actual value. (*Schenck v. Andrews*, 57 N. Y. 142, 143, 144; *Boynnton v. Andrews*, 63 id. 93; *Douglas v. Ireland*, 73 id. 100; *Brockway v. Ireland*, 61 How. 373; *Thurber v. Thompson*, 21 Hun, 472; *L. S. I. Co. v. Drexel*, 90 N. Y. 87; *Pier v. Hanmore*, 86 id. 95.) No previous authority was proved to have been given B. E. Smith, as general manager, to borrow money for the use of the company, execute notes therefor and pledge bonds or other property of the company to secure the payment of these notes; nor was any subsequent ratification or acquiescence on the part of the company shown. Neither was it proved that the money borrowed by Smith, and for which he gave these notes, was applied to the use of the com-

Opinion of the Court, per BRADLEY, J.

pany, nor that the company derived any benefit therefrom, or from any part thereof. (*Queen v. S. A. R. R. Co.*, 3 J. & S. 154-159; *Alexander v. Cauldwell*, 83 N. Y. 480-485; *Beveridge v. N. Y. E. R. Co.*, 112 id. 1; *McCullough v. Moss*, 3 Denio, 567; *Niagara v. Bachman*, 66 N. Y. 262; *Bank v. Clements*, 2 Bosw. 600; *People's Bk. v. S. A. R. C. Church*, 109 N. Y. 512; *Marvin v. Wilbur*, 52 id. 270.)

W. W. MacFarland for respondents. 1. Directors must know that the certificates made by them are true at their peril. (*Torbett v. Eaton*, 17 N. Y. S. R. 117; 113 N. Y. 623.)

BRADLEY, J. The action was brought to recover the amount of a debt alleged to be due the plaintiff from the Rockaway Beach Improvement Company (limited), a corporation created pursuant to the provisions of the statute providing for the organization and regulation of certain business corporations. (Laws of 1875, chap. 611.) The defendants were directors of the company. And the alleged ground of the action is that a certificate signed by them, representing that the amount of the capital stock of the corporation, amounting to \$700,000, was fully paid, was false within the meaning of the statute, which provides that "If any certificate or report made, or public notice given, by the officers of any such corporation, shall be false in any material representation, all the officers who shall have signed the same, shall be jointly and severally liable for all the debts of the corporation, contracted while they are officers thereof." (Id. § 21.) The certificate of organization was filed with the secretary of state, February 18, 1880, in which it was stated that the capital stock would be \$700,000, divided into 7,000 shares of \$100 each; that the principal business office would be at Rockaway Beach, N. Y.; and that the object for which the company was to be formed and the nature of its business, were the purchase of lands and the building of a hotel thereon, together with bath-houses, piers and a theatre and such other accessories as were usual or necessary for the completion and operation of the hotel

Opinion of the Court, per BRADLEY, J.

business at a seaside watering place. This to be done at Rockaway Beach, in Queens county, N. Y. Books were opened, pursuant to the requisite license, for subscriptions to the capital stock of the company, the full amount was subscribed, and afterwards the defendant Attrill by deed of date April 1, 1880, conveyed to the corporation about 120 acres of land situated at Rockaway Beach, in the town of Hempstead, county of Queens, subject to a mortgage of \$72,000, the payment of which was assumed by the company. This deed was made and taken in payment of the full amount of the capital stock, no part of which was paid for in cash. The certificate, alleged by the plaintiff to have been false was made by the defendants and other directors, June 30th, and filed about July 1, 1880, in which they represented "that the amount of capital paid in, in full, is the sum of \$700,000, being the full amount of the capital stock of the said company." The value of the land conveyed by Attrill to the company was the subject of conflict of evidence given in behalf of the respective parties, and the conclusion was warranted that \$700,000 was largely in excess of its value. The view of the trial court was, that although the value of the property may have been less than the amount of the capital stock, in payment for which it was taken by the company, that fact alone did not render the certificate false within the meaning of the statute or charge the defendants with liability, but it was dependent upon the further fact that they knew, when the certificate was made, that the value of the land so taken was materially less than the amount of the capital stock, and thus was involved the question of the good faith of the defendants, so far as it had relation to their understanding or belief of the equivalency or otherwise of such value and amount. As bearing upon that subject it appeared by evidence, in addition to the value, that in July, 1879, in contemplation of the organization of this company and for the purposes before mentioned, the defendant purchased and took conveyance of 140 acres of land, of which that so conveyed to the company was a portion, for \$80,000, of which he paid \$8,000 and gave the mortgage

Opinion of the Court, per BRADLEY, J.

above referred to, to secure the payment of the residue of the purchase-money. It was also contemplated that this land conveyed to the company should constitute in the outset all its property and assets, and that the means to carry forward the project in view should be derived from the sale of bonds of the company secured by mortgage upon the land. It was to be the basis for the revenue to meet its financial requirements in the expensive enterprise in view. This did not necessarily furnish information that the property had less value than it was in the certificate represented to have, but the fact that the purpose was to so greatly burden it for resources, would seem to have called attention to its ability in value to bear it. It evidently was known to the defendants that the value of the land, whatever it was, was speculative in so far that it was dependent upon its successful availability for an enterprise something like that upon which the movers in it were to and did enter. It could not be said to have had either a market or intrinsic value of large amount disconnected from a purpose to make such a use of it. It may be that expectation of success enabled the defendants to believe that it had the value which they so represented it had. It seems by what followed that such belief, if it existed, was unfounded. No later than in April, 1880, the company had incurred liabilities amounting to upwards of \$400,000, which on the first of July following had increased to \$994,000, without any means to pay them, and that in August, 1880, its property was taken into the custody of a receiver appointed by the court for that purpose. It is true that all this may have been consistent with a mere mistaken belief, or error in judgment of the defendants and those associated with them, and thus they might be relieved from the imputation of knowledge that the value certified was excessive or that they purposely misrepresented it. There were some circumstances which might be construed as tending to support that view. The property was situated on the beach and was to be made easily accessible to the people of the cities of New York and Brooklyn, by means of a then projected railroad (known as the New York, Woodhaven and Rock-

Opinion of the Court, per BRADLEY, J.

away Beach railroad which was afterwards constructed) running into it, which may have been supposed to make that location desirable as a seaside resort. This seemed to have been one of the leading considerations which gave inception to the enterprise. This railroad project was said to be under the control of one Smith, who was actively associated with defendant Attrill in the outset, and who became the manager of the business of the company. And the fact that Attrill advanced considerable money to start, in progress, improvements on the property was a circumstance bearing upon the question of his faith in the movement, although he expected reimbursement from the company of his advances. And the same may be said of the expenses he incurred in putting gas-works on adjacent property, the practical availability of which, is said to have been somewhat dependent upon the use to be made of gas for light upon the premises in question. His expectations, whatever they were, had importance upon the question so far only, as they had a bearing upon his knowledge or belief as to the value of the property at the time of the sale of it to the company. Its then value was the measure of consideration which the company had the right to pay for it. These defendants were directors at the time of the sale and conveyance of the property to the company. They, with their associates, had the responsibility of seeing to it that the purchase-price did not exceed the fair value. That was the command of the statute. (Id. § 14.) There are considerations of public concern which require the proper discharge of duty in that respect, so that the appearances given by reports and certificates, filed pursuant to statute and representing the financial condition of corporations, may not delusively bring to them credit to the prejudice of those giving it.

The means of judging of the knowledge which the defendants had and upon which they acted, and the motive by which they were influenced, must be derived from the circumstances treating those persons as men of ordinary discernment and sagacity. The officers assuming the responsibility and charged with the duties of the management of the business of corpora-

Opinion of the Court, per BRADLEY, J.

tions, are not supposed to shut their eyes to that which is open to observation and legitimately subject to their inspection and control. The defendant Attrill was familiar with the property. It had no known market value. The sum which constituted the consideration of the sale to the company was in some sense arbitrary, governed, perhaps, by the amount which it was assumed the contemplated improvement would cost; and before the company was organized he, for some reason, desired to be relieved from his situation in relation to the property. He says this was because Smith, his associate in the enterprise and who was to take half the profits of it, had become obnoxious to him. But the relation was continued, and Smith was made manager of the business of the company. The enterprise may have been treated wholly as one of speculation, resting on expectation and dependent upon its success. The amount for which the property was handed to the corporation was large in comparison with the sum for which it was purchased by the defendant, and was large in fact. The circumstances, some of which have not been specifically referred to, were such as to furnish to Attrill information that the property conveyed by him to the company, was not worth an amount equal to that of the capital stock, and, having found that it was not worth that sum, the jury were warranted in finding that, at the time he signed the certificate, he knew that such consideration was considerably in excess of its then value. This was a question of fact upon the evidence, which must here be deemed to have conclusively been determined in the court below. If such knowledge was essential to the liability of the defendants, it is not clear that the recovery against the defendant Soutter can be supported in view of the exception taken to the denial of the motion to dismiss the complaint as to him. He never had seen the property at the time the certificate was made; had taken no part in the matter until he became director, and, to make him such, he was presented by Attrill with fifty shares of the stock; and, although he knew the object of the corporation, was fully advised of the contemplated enterprise, and understood what the consideration of

Opinion of the Court, per BRADLEY, J.

the conveyance to the company was, and how it was paid, those facts were insufficient to charge him with actual knowledge that the consideration was in excess of the value of the property. The information which it appears he had was consistent with good faith so far it was dependent upon want of actual knowledge on his part in that respect. (*Schenck v. Andrews*, 57 N. Y. 132; *Boynton v. Andrews*, 63 id. 93; *Douglass v. Ireland*, 73 id. 100; *Pier v. Hanmore*, 86 id. 95; *Bonnell v. Griswold*, 89 id. 122.) The cases just cited had reference to certain provisions of a prior statute relating to corporations for manufacturing, etc., purposes, in which it was provided that "If any certificate or report made, or public notice given, by the officers of any such company, * * * shall be false in any material representation, all the officers who shall have signed the same, knowing it to be false, shall be jointly and severally liable for all the debts of the company contracted while they are stockholders or officers thereof." (Laws 1848, chap. 40, § 15.) It is seen that such provision is substantially like that first above mentioned, except the effect given to it by the use of the words "knowing it to be false," which were omitted in the latter. The construction of section 21 of the act of 1875, in view of the omission of those words, is not since the case of *Torbett v. Eaton* (113 N. Y. 623; 49 Hun, 209) an open question. That action was brought by a creditor of the American Opera Company (limited), incorporated under the act of 1875, against a director charging that an annual report of the company subscribed by the defendant was false. The question arose upon demurrer to the answer of the defendant alleging that he signed the report in good faith, having no knowledge or information that it was in any respect untrue, and that he did not have any reason to believe it to be untrue in any respect; and that he exercised proper care and diligence before he signed the report to ascertain the facts set forth and to which it related. The question whether knowledge of the falsity of the report was essential to the liability of the defendant, was distinctly raised and the sole question presented. The demurrer was

⑤ Sustained upon the ground that necessary, but that the fact that in any material representation was action to recover a debt due to the party. And in affirming the judgment the court so held, although it does not appear that the opinion was delivered by the court. The Supreme Court was delivered by the court, considering distinctly and quite fully the construction and effect of the provision which the right to maintain the action. This view obviates the necessity for the exceptions in the record, and the question is concerned, to dispense with the suggestion before expressed as

Prior to 1853 a manufacturing corporation to issue stock in payment for property then provided for (Laws 1853, chap. 10). The facilities of creating corporations for the purpose in the act of 1848 and the several subsequent acts extending its provisions. In this vision there were opportunities to do so. (C) Case, to purchase property and put up capital, amounting to many times the value of the means of speculative enterprise, with the debts of the company in the event of success, provided the projectors and the meaning of the law. That method of incorporation, is evidently more likely to result in a judgment, and to work more prejudicial than would that of issuing stock for cash. It would give such credit as the company may have in that behalf, to purchase property for

There is a question of public policy, which requires careful consideration, bearing upon the subject made for the creation of corporate powers. It may have been in view of

Opinion of the Court, per BRADLEY, J.

to section 15 of the act of 1848, that the change from it, in the provision of section 21 of the act of 1875, was made. It is evident that the word "false" in the former statute was not treated as importing knowledge or bad faith. And, recognizing that fact, it is urged by the learned counsel for the defendants that the assumption should not be indulged that the same meaning which that word had in that statute was intended to be applied to it in the act of 1875, because it might in its consequences be seriously prejudicial to persons acting innocently and in good faith. But it may be observed that while liability within the provision in question is in some sense penal in character, it may have been intended for the protection of the creditors of corporations, created pursuant to that statute, so far as it might be done against the delusive appearances of financial condition, as represented by the official reports and certificates of those charged with the means of knowledge to make and the duty of making them, and placing them on file, where they may be subjected to inspection by the public. For that purpose, at least, the effect may be deemed salutary of a legislative provision, which would be productive of appreciation of duty, and the faithful discharge of it by those representing business corporations in the exercise of their franchises. And it is not seen that the prudence, requisite to protection against undue personal liability, may not be exercised under the statute without serious prejudice to legitimate corporate enterprise.

The defendants offered evidence as to value of this, based upon comparison with other seaside property at different places, and exception was taken to its exclusion. It may be that such evidence would have furnished some guide for estimate of the value of the property, but might not. Such evidence would present collateral issues, which might, and very likely would, involve a variety of considerations having relation to similarity or difference, and to advantages and disadvantages of the different properties in numerous respects as compared with that in question. It is quite well settled that evidence of that character is not admissible upon the

Opinion of the Court, per BRADLEY, J.

question of value of property in controversy. (*Gouge v. Roberts*, 53 N. Y. 619.) And the same may be said of the opinions of witnesses, which the defendants sought to introduce, founded solely upon their knowledge of transactions in other property along the coast and not in the vicinity of that in question. It is contended that such a rule ought not to be applied to this case because the property was without a market value, and its value was dependent upon its advantages and capacity for development and improvement as a place of seaside summer resort, on the plans adopted at other places, such as Long Branch, Elberon, Coney Island and Wave Crest, to which reference would likely be had by the parties who had in view like improvement upon the premises in question, and, therefore, the jury should be advised by evidence of the information which a purchaser would have on the subject, and of the facts which would or might influence him and his opinion of the value of the property for such purposes. The adoption of such a rule to the extent claimed, would open a wide field of speculative inquiry. If, however, it could successfully be affirmed that the influence, which would lead one man to an opinion, would be the common judgment of all prudent business men, there would be much force in the suggestion that the jury should by the evidence be furnished the opportunity to act upon such information, but since the reasons and influences which induce speculative enterprises, may be somewhat peculiar to those who engage in them, and the views of comparative advantages widely differ in respect to feasibility and results, it seems to be less conservative and reliable, as a rule of evidence, to attempt to base values merely upon comparison with those of other property at other places, resulting from its use, profitable or unprofitable, or upon opinions which witnesses may have formed solely on the relation in value arising from such use, and which they may assume it has to that which is the subject of controversy. The results, to follow, of development and use of the latter for similar purposes must be somewhat experimental and speculative. The conclusion is that there was no error in the rejection of the evidence. The

books of the company were competent as evidence so far as related to any entries legitimately contained in them and so far as they were relevant to the issues on trial. (*Allen v. Coit*, 6 Hill, 318; *First National Bank v. Tisdale*, 84 N. Y. 655; *Blake v. Griswold*, 103 id. 429.) It is not apparent that the liabilities of the company in April, June, and the first of July, 1880, had any bearing upon the question of value of the property. But upon the further issue acquiescently tried, whether the defendants were chargeable with *scienter* and acted in good faith in respect to value in making the representation contained in the certificate, assuming that the value was less than the amount of the stock, the evidence may have had some bearing, although slight. The entries may also have been competent as bearing upon the issue whether the debt in question was that of the company inasmuch as that, in one view taken, may have been dependent upon the adoption by the company of the course of business as conducted by Smith, its manager. Further entries in the books of the company were also introduced in relation to the fund produced by the loan made of the plaintiff, which constituted the debt to recover which this action was brought. This evidence was competent, not perhaps to establish the fact that the money was borrowed of him, that was proved by other evidence, but to show that the company had the benefit of it, as bearing upon the disputed question whether it was the debt of the company. Smith, the manager of the company, to which position he was duly appointed, made the loan of \$100,000, and gave the plaintiff his note for the amount, payable to its order, which note was indorsed by Smith, as such manager, in the name of the company, and as collateral security for its payment, he delivered, with the note, mortgage bonds of the corporation. It was contended that he had no authority to make the loan for the company, or to indorse for it the note. There was no error in the reception of the evidence furnished by the books. It appeared by evidence taken subject to exception, that the property, with improvements, was afterwards sold at judicial sale for \$175,000. This evidence was admissible on the question of value, although it may

Opinion of the Court, per BRADLEY, J.

have been entitled to but little force in that direction. (*Campbell v. Woodworth*, 20 N. Y. 499; *Hoffman v. Conner*, 76 N. Y. 121.)

It is deemed unnecessary to refer specifically to the evidence on the subject, but it was sufficient to permit the court to submit, as it did, to the jury the question whether the debt, to recover which this action was brought, was that of the company. In response to the request to charge, that before a verdict could be found for the plaintiff, the jury must be satisfied by affirmative proof that Smith was authorized to indorse the name of the company on the note, by prior resolution of the executive committee or by the board of directors or by ratification, by resolution, or some equivalent act of such committee or board, the court charged substantially that the jury, to reach such result, must find either prior authority or subsequent ratification, and that it could be evidenced by general course of business as well as by resolution. There was no error in this charge, and the exception to the refusal to charge as requested was not well taken.

The defendants' counsel requested the court to charge "that by the words 'at its fair value' in section 14 of the act, is meant the fair value of such property for the uses and purposes of the company in the conduct of its legitimate business and not the actual market value or the actual intrinsic value thereof at the time it is acquired by the company," and complain of the modification made by the trial justice in response to the request, that he knew of no value other than intrinsic or market value, and then proceeded to charge the jury to the effect that they had the right to consider, in determining the fair value of the property, its value for the use to which it was to be put, and the adaptability of it to any specific purpose, that they are constituent elements of intrinsic value, and although the value to be ascertained by the jury was that, at the time of the sale and conveyance to the company, any peculiar advantages, known or unknown, and even if known would make it advantageous to a few only, properly enter into consideration and go to make up the value as of that time.

Opinion of the Court, per BRADLEY, J.

There was no error in the modification or in the refusal to charge as requested. The fair value contemplated by the statute is that which the property had at the time of the sale and which constituted the consideration upon which the subscription to the capital stock of the company was satisfied. Then was the time the estimate of the value must, for that purpose, be deemed to have been made. It could not be dependent upon subsequent success or failure of the investment further than such result may have been legitimately within evidential contemplation at the time of the sale in view of the uses, for which it may have had available advantages within itself. This was fairly submitted by the court to the consideration of the jury.

The jury were properly not required to give the defendants the benefit of all reasonable doubts, in the sense applicable to criminal cases, but were permitted to govern their action in reaching a result by a fair preponderance of evidence. (*People v. Briggs*, 114 N. Y. 56.)

Nor is any force, applicable to this case, seen in the contention of the learned counsel for the defendants, that the statute giving the remedy for the relief sought is in violation of the Constitution. The corporate franchise is taken subject to the terms and conditions of the statute, and those who take the privileges to be derived from a corporation and undertake its management do so voluntarily. They assume the duties incident to it and the statutory responsibilities which result from failure to observe and perform those duties.

No other question seems to require the expression of consideration.

The judgment should be affirmed.

All concur, except POTTER, J., dissenting.

Judgment affirmed.

Statement of case.

ALFREDERICK S. HATCH, Respondent, v. HENRY Y. ATTRILL et al., Appellants.

In an action against the directors of a corporation, organized under the act of 1875 (Chap. 611, Laws of 1875), providing for the organization of certain business corporations, to recover a debt of the corporation, on the ground that defendants had signed a certificate, stating that the capital stock had been paid in, which was false, a report was offered in evidence by plaintiff, which was signed by the commissioners, to whom a license to open books for subscription to the capital was issued, which stated that the books were opened for subscriptions to the stock; that certain persons subscribed, each one at the time paying in cash ten per cent of the par value of each share so subscribed for; that at least one-half of the stock was subscribed in accordance with the statute, and that a meeting was then called, by-laws made and directors of the company elected. Defendants were two of those commissioners. Objection was made to so much of this report as related to the action of the commission; this was overruled. It afterwards appeared, but had not then been shown, that ten per cent of the subscription had been paid in cash. *Held*, that the reception of the evidence was not error; that the report was part of the statutory proceedings to complete the organization of the company and was competent.

The whole stock of the company was issued in payment for a piece of land conveyed to the company by defendant A., which plaintiff claimed was of much less value than the amount of the stock. One of the plaintiff's witnesses gave, without objection, his opinion as to the value of the property so conveyed; after his cross-examination defendant's counsel moved to strike out this evidence as incompetent. This motion was denied. *Held*, no error; that the ruling was within the discretion of the court; that if the effect of the cross-examination upon the question of value was such that it was not entitled to any consideration, defendant's counsel had the right to have the jury so instructed by charge of the court, but not to have it stricken out on motion.

Defendants offered to show that the certificate in question was filed in consequence of a suggestion of F., one of the original plaintiffs, that one should be made and filed, for the purpose of relieving defendant A. from liability under the statute, which provides, that the stockholders shall be severally individually liable to the creditors of the company to an amount equal to that of stock held by them respectively, for all debts and contracts of such company, until the whole amount of the capital stock has been paid in and a certificate thereof been made and recorded. (§ 37.) The certificate filed made no reference to the property; this evidence was objected to and excluded. *Held*, no error; that it did not tend to show acquiescence of F. in the truth of the certificate; nor could it be inferred

Statement of case.

from it, that a false certificate was within his contemplation, but rather, that the requisite statutory certificate should be made. After the jury retired they were directed by the court, with the consent of the parties, to bring in a sealed verdict the next morning, if they agreed in the meantime. They then presented a sealed verdict for plaintiff for \$50,000; the amount of the company's indebtedness to him was \$163,695.31. The court refused to receive the verdict and directed the jury to again retire and instructed them, that if they found a verdict for the plaintiffs, to find it for the full amount claimed, which they did. *Held*, no error; that the question as to whether or not plaintiff was entitled to recover, was one of fact for the jury, but when this was found for the plaintiff, the measure of damages was the amount of the debt, and this he was entitled to recover; that the court had power to refuse to receive a verdict, which was not such a one as the jury was legally at liberty to render, and before it was recorded, to send the jury back to reconsider it.

(Argued December 6, 1889; decided January 28, 1890.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made the second Monday of May, 1886, which affirmed a judgment in favor of plaintiff entered on a verdict.

The nature of the action and the facts are sufficiently stated in the opinion.

James C. Carter for Henry Y. Attrill, appellant. Grave errors were committed in the admission and exclusion of evidence as to value of the property. (*Reed v. Rome*, 48 Henry 231; *Sthurm v. Williams*, 38 N. Y. Super. 325.)

Coles Morris for Henry Y. Attrill, appellant. The motions to dismiss the complaint or to direct a verdict for the defendants, which were made at the close of the case, should have been granted. (*Cotton v. Wood*, 8 C. B. [N. S.], 568; *Hayes v. F. S. S. R. R. Co.*, 97 N. Y. 259; *Dwight v. G. L. Ins. Co.*, 103 id. 358, 359; *Bauleo v. N. Y. & H. R. R. Co.*, 59 id. 365; *Schwinger v. Raymond*, 105 id. 648; *Shultz v. Hoagland*, 85 N. Y. 464; *Morris v. Talcott*, 96 id. 100; *Dillon v. Dillon*, 7 Eng. Eccl. Rep. 391; *Pollock v. Pollock*, 71 N. Y. 142.) Under the circumstances of this case, it is impossible to say that the defendants were not injured by the

Opinion of the Court, per BRADLEY, J.

erroneous rulings and instructions to the jury, to which exceptions were taken. (*N. Y. G. & I. Co. v. Gleason*, 78 N. Y. 514-517; *Smith v. Crego*, 7 N. Y. Supl. 86; *Shultz v. Hoagland*, 85 N. Y. 464; *Morris v. Talcott*, 96 id. 100; *Green v. White*, 37 id. 405; *Stokes v. People*, 53 id. 183; *Smith v. Shoemaker*, 17 Wall. 630.) The learned trial judge also erred in refusing to receive the sealed verdict which the jury rendered in favor of the plaintiffs for \$50,000, and the exception by the defendants to such refusal was well taken. (*Sutliff v. Gilbert*, 8 Ohio, 405; *Warner v. N. Y. C. R. R. Co.*, 52 N. Y. 437.) The learned trial judge also erred in giving instructions, as he did, to the jury in the absence of the counsel for the defendants, after refusing to receive the sealed verdict and before he directed them again to retire. (*W. T. B. & L. Co. v. Mix*, 51 N. Y. 558; *Campbell v. Becket*, 8 Ohio St. 210.)

Delos McCurdy for William K. Soutter, appellant.

W. W. MacFarland for respondent. The ruling excluding the testimony of Attrill as to a statement made to him by Fisk, originally one of the plaintiffs, was proper. (Lindley on Part. 307, 309, 412; *Wetmore v. Porter*, 92 N. Y. 82; *King v. Sarria*, 69 id. 28; *Calkins v. Smith*, 48 id. 614; *Menagh v. Whitehall*, 46 id. 143; *Crook v. Rindskopf*, 105 id. 476.) Evidence as to the company's financial condition was relevant, material and part of the *res gestae*. (*F. Nat. Bk. v. Tisdale*, 84 N. Y. 655; *Humphrey v. People*, 18 Hun, 393; *Allen v. Coit*, 6 Hill, 318; *Heath v. Corning*, 3 Paige, 566.)

BRADLEY, J. The purpose of this action was to recover the amount of a debt alleged to be due to the plaintiff from the Rockaway Beach Improvement Company (limited), a corporation organized pursuant to the general act providing for the organization and regulation of certain business corporations. (Laws 1875, chap. 611.) The defendants were directors of the company, and the alleged ground of the

Opinion of the Court, per BRADLEY, J.

action is that a certificate signed by them, representing that the amount of the capital stock of the company, amounting to \$700,000, was fully paid, was false; and that they were charged with liability by the statute which provides that, "If any certificate or report made, or public notice given, by the officers of any such corporation shall be false in any material representation, all the officers who shall have signed the same shall be jointly and severally liable for all the debts of the corporation contracted while they are officers thereof." (*Id.* § 21.)

The payment for the capital stock was made by the conveyance by defendant Attrill to the company of 120 acres of land subject to a mortgage of \$72,000. And the alleged falsity of the certificate was in the fact, as also alleged, that the value of the land so conveyed was much less than the amount of the stock. The certificate in question here is the same, and the facts on the merits are, in all respects, substantially so in this case as in that of *Huntington v. The Same Defendants*, decided at the present session of this court.* For a more particular statement of the facts, and for the views of the court upon the legal propositions presented, reference may be had to the opinion of the court in the *Huntington case*. There are a few additional questions arising upon exceptions in this case. They will be considered. The statute provides that, on filing the certificate with a view to the formation of a corporation, the secretary of state shall issue a license to the persons making the certificate, empowering them, as commissioners, to open books for subscription to the capital stock; that the commissioners shall proceed to open books for that purpose, and no subscription shall be received unless at the time of making it, the subscriber pay to the commissioners ten per cent of the par value of the stock subscribed for in cash; and that when one-half of the capital stock has been subscribed, the commissioners shall call a meeting of the subscribers for the purpose of adopting by-laws for and electing directors of the corporation. (*Id.* §§ 4, 5.)

*Note, *ante*, p. 365.

Opinion of the Court, per BRADLEY, J.

The commissioners to whom the license was issued made their report, by which it was made to appear that books were opened for subscriptions to the stock of the company, and, after stating them, added that at the time of making the subscription, each subscriber paid in cash ten per cent of the par value of each and every share subscribed for by him; and that at least one-half of the capital stock was subscribed in accordance with the statute, and then proceeded to state that a meeting was called, by-laws made and directors of the company elected. The defendants were two of those commissioners, and, with others, signed the report. Upon the trial that report was, by the plaintiff, offered in evidence. Objection was made to so much of it as related to the action of the commission, and exception was taken to its reception. This report was within the statutory proceeding to complete the organization of the company, and was competent, although, perhaps, in view of the pleadings, unnecessary, but the objection was not taken on that ground, or to it, as a whole. The fact that ten per cent of the subscriptions was not paid in cash, had not appeared when this evidence was introduced. The exception was not well taken.

A witness called on the part of the plaintiff gave, without objection, his opinion of the value of the property in question, and, following his cross-examination, a motion made by the defendants' counsel to strike out the evidence of the witness as incompetent was denied and exception taken. There was no error in that ruling. If the effect of the cross-examination upon the evidence of the witness on the question of value was such that it was not entitled to any consideration, the defendants' counsel had the right to have the jury so instructed by the charge of the court, but not to have it stricken out on motion. The most that can be said on the defendants' view of the evidence, is that the ruling was within the discretion of the court. (*Gawtry v. Doane*, 51 N. Y. 84; *Marks v. King*, 64 id. 628; *Platner v. Platner*, 78 id. 91; *Stokes v. Johnson*, 57 id. 673.)

The defendants offered to show that the certificate in ques-

Opinion of the Court, per BRADLEY, J.

tion was filed at the suggestion of Mr. Fisk, who was originally one of the plaintiffs in this action, for the purpose of relieving defendant Attrill from liability under the statute, and exception was taken to the exclusion of the evidence. It may be observed that the statute provides that the stockholders shall be severally individually liable to the creditors of the company to an amount equal to that of stock held by them respectively for all debts and contracts of such company, until the whole amount of the capital stock has been paid in and a certificate thereof has been made and recorded. (Id. § 37.) This evidently was the provision referred to in the proposed proof. And it is contended that the evidence so offered would tend to prove acquiescence of Fisk in the truth of the certificate, and have a bearing upon the valuation put upon the property by the defendants. It is not seen how any such inference could be derived from the evidence offered. The certificate makes no reference to the property, nor could it be inferred by such evidence that a false certificate was within the contemplation of Fisk, but rather that the requisite statutory certificate would be made. Upon that assumption the suggestion was a wise one. It is not seen that the evidence could have had any relevancy to the advantage of the defendants upon any question in this case.

The further question had relation to the rendition of the verdict. Sometime after the jury retired for deliberation, they were directed by the court to bring in a sealed verdict the next morning if they agreed in the meantime. They did then present to the court a sealed verdict in favor of the plaintiffs for \$50,000. Upon opening it, the court informed the jury that it could not receive such a verdict, refused to do so, and directed the jury to again retire, and instructed them that if they found a verdict for the plaintiffs to find it for the full amount claimed. The jury retired and afterwards returned into court and rendered a verdict of \$163,695.31. The direction that the jury seal their verdict was given in the evening, with the consent of the parties, and the court was then adjourned until the next morning, which was Thanksgiving,

Statement of case.

and it was understood that the court should receive the verdict in the morning, and that all motions would be reserved until a subsequent day. The defendants' counsel afterwards appeared in court and excepted to the refusal of the court to receive the verdict as first found by the jury. The amount of the debt due the plaintiff was that for which the verdict was finally rendered. That was not questioned. Whether or not the plaintiff was entitled to recover any sum against the defendants, was a question of fact for the jury, but in the event they found for the plaintiff the amount of the debt was the measure of recovery. When, therefore, the jury found that the plaintiff was entitled to recover, their further duty was plain. The court refused to receive the verdict as first found, because it was not such an one as the jury, under the instructions of the court, legally were at liberty to render, and they were sent back to reconsider the verdict, so far as it related to the question of fact, with directions as to the amount of it in the event they found for the plaintiff. In that respect and in such event it was matter of correction of a mistake. The province of the jury was not to any extent invaded by this action of the court. And before the verdict was recorded, it was within the recognized power of the court for the purpose, and as done in this instance, to send the jury back to reconsider their verdict. (*Warner v. N. Y. C. R. R. Co.*, 52 N. Y. 437.)

The judgment should be affirmed.

All concur, except POTTER, J., dissenting.

Judgment affirmed.

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156	34

THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF
NEW YORK, Respondent, v. THE EIGHTH AVENUE RAILROAD
COMPANY, Appellant.

In 1851 plaintiff entered into a contract with P. and others, under which they were authorized, and the consent of plaintiff's common council was given them, to construct and operate a horse railroad through certain streets in the city of New York, each of its cars to be annually licensed by the mayor, and such annual fee to be paid therefor as the common

Statement of case.

council might determine. The company was organized and the road in part constructed prior to the passage of the street railroad act of 1854 (Chap. 140 of the Laws of 1854). In 1855, the company was incorporated under and by virtue of the General Railroad Act of 1850 (Chap. 140, Laws of 1850), and said act of 1854. The common council fixed the license fee for defendant's cars, and it paid the same from 1860 to 1874, when the Legislature passed an act (Chap. 478, Laws of 1874), requiring defendant to extend its route in said city, and providing that, when such extension was completed, defendant should operate its road, "subject only to the provisions of the General Railroad Act of this state, with its amendments." Defendant complied with the provisions of said act, and in this action to recover license fees claimed that, as no such fees were required by the General Railroad Act, it was relieved by said proviso from paying the same. *Held*, untenable; that the act of 1854 was *in pari materia* with the General Railroad Act, and in effect amended it by prohibiting the construction of a railroad upon the streets of a city save upon compliance with prescribed conditions; said act is, therefore, one of the acts subject to the provisions of which defendant holds and operates its road; also that there is nothing in the act of 1874 which limits, repeals or modifies the act of 1854.

Also, *held*, that although the grant to defendant and conditions imposed upon it by the common council were void when made, not being within its powers, they were ratified and confirmed by the act of 1854 and thus became valid and binding.

Also, *held*, the fact that the plaintiff's common council had passed an ordinance, imposing a penalty for a failure to procure a certificate for a license, did not operate to prevent plaintiff from maintaining the action to recover license fees.

Reported below 43 Hun, 614.

(Argued December, 16, 1889; decided January 28, 1890.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made March 2, 1887, which affirmed a judgment in favor of plaintiff, entered upon a verdict directed by the court on trial at circuit.

The nature of the action and the facts are sufficiently stated in the opinion.

John M. Scribner for appellant. Whatever may have been the previous liability of the defendant for license fees, the act of 1874 (chap. 478), was in words or in substance a new charter granted to the defendant by the state for a consideration,

Statement of case.

to-wit, the extension of the defendant's railroad and the increased public accommodation afforded by such extension. (Laws of 1850, chap. 140, § 3; Laws of 1860, chap. 10, p. 16; *Davis v. Mayor, etc.*, 14 N. Y. 506; *Milbau v. Sharp*, 27 id. 611; *People v. Kerr*, Id. 188; U. S. Const., art. 1, § 10.) A contract having been made by the sovereign with the defendant which is expressed and contained in the said act, chapter 478 of the Laws of 1874, to the effect that if the defendant would construct the extension of its railroad as thereby required, and put the same in operation for public accommodation, as it has done, the defendant should thereafter be allowed to use and operate its entire railroad, subject only to the provisions of the General Railroad Act of 1850, which contains no provisions for the payment of any license fees, it seems to be clear that the alleged ordinances of the common council passed respectively December 31, 1858, and March 24, 1875, do not affect the defendant. (*Mayor, etc., v. S. A. R. R. Co.*, 32 N. Y. 261; *Mayor, etc., v. T. A. R. R. Co.*, 33 id. 42.) The new contract of 1874, between the defendant and the state, having been actually executed on the part of the defendant, the state itself could not destroy or avoid the obligations of the contract on its part. (*Danolds v. State*, 89 N. Y. 36; *Dartmouth College v. Woodward*, 4 Wheat. 519; *Fletcher v. Peck*, 6 Cranch. 87, 137; *State of New Jersey v. Wilson*, 7 id. 164; *People v. Stephens*, 71 N. Y. 549; *Milbau v. Sharp*, 27 id. 611.) This action is strictly an action for recovery of license fees, and is founded on two ordinances of the common council, one adopted in the year 1858 and the other in the year 1875. These ordinances plainly provide for permits or licenses to be issued in advance for the privilege of running street cars. A license does not operate retrospectively. (*Calkins v. B., etc., G. Co.*, 1 T. & C. 546.) There can be no recovery by the plaintiff, either under this agreement or under the ordinance in question without allegation and proof that licenses were actually issued or tendered, and that payment of license fees was actually demanded. (*Weller v. Tuthill*, 66 N. Y. 351; *Santa Cruz v. S. C. R. R. Co.*, 56 Cal. 143, 149; *South-*

Statement of case.

wick v. F. N. Bk., 84 N. Y. 420; *Hogan v. Burton*, 16 N. Y. S. Rep. 65; *Dakin v. Williams*, 11 Wend. 70; *Lester v. Jewett*, 11 N. Y. 453; *Thompson v. Gardner*, 10 Johns. 404-405; *Beech v. Vanderburgh*, Id. 361.) The argument that the act of 1874 (chap. 478), was probably framed and passed at the instance of the company itself, is not supported by a particle of evidence. (*Langdon v. Mayor, etc.*, 93 N. Y. 147; *Williams v. Mayor, etc.*, 105 id. 419-436; *Mayor, etc. v. Starin*, 106 id. 19.) Section 3 of the act of 1874 repeals all acts or parts of acts inconsistent with the provisions of this act, and hence the plaintiff is not entitled to exact license fees from the defendant. (*Heckmann v. Pinkney*, 81 N. Y. 215; *People v. G. & S. T. Co.*, 98 id. 78; *Lyddy v. Long Island City*, 104 id. 221.) There is no defect in the title of the act of 1874. It does not violate the provisions of section 16, article 3 of the Constitution of the state. (*People v. Briggs*, 50 N. Y. 558; *Brewster v. City of Syracuse*, 19 id. 117; *S. M. Ins. Co. v. Mayor, etc.*, 8 id. 252; 27 Ill. 534; *People v. Lawrence*, 41 N. Y. 139; *Fellows v. Mayor, etc.*, 8 Hun, 489; *In re Astor*, 50 N. Y. 367; *More v. Deyoe*, 22 Hun, 220; *Harris v. People*, 59 id. 601; *Matter of Volkenning*, 52 id. 650; *Village of Gloversville v. Howell*, 70 id. 290; *In re Dep. Pub. Parks*, 86 id. 439; *People v. Banks*, 67 id. 572; *In re L. & W. O. Home*, 92 id. 120; *In re United States*, 96 id. 227; *In re Mayor, etc.*, 99 id. 569; *Comrs. v. Dwight*, 101 id. 9; *McIntire v. Allen*, 43 Hun, 125; *In re Knaust*, 101 N. Y. 194.)

David J. Dean for respondents. By the original concession, and the subsequent action of the common council and the legislature, the defendants became bound to pay to the city fifty dollars and twenty-five dollars, respectively, license fees upon the cars run on this route. (*Mayor v. D. D. R. R. Co.*, 112 N. Y. 140; *Mayor v. B. & S. A. R. R. Co.*, 97 id. 275.) The act of 1874, which authorized the change of terminus of the defendant's route in the defendant's interest, is to be construed liberally in favor of the public, strictly

Statement of case.

against the grantee of the privileges therein conferred. (*Dermott v. State*, 99 N. Y. 107; *Landon v. Mayor, etc.*, 93 id. 129; *Mayor, etc., v. B. & S. A. R. R. Co.*, 97 id. 281; *O. F. Co. v. Fish*, 1 Barb. Ch. 547; *Thompson v. N. Y. & H. R. R. Co.*, 3 Sand. Ch. 625; *M. B. Co. v. U. & S. R. R. Co.*, 6 Paige, 554; *C. B. Co. v. Magee*, 6 Wend. 85; *A. & C. P. R. Co. v. Douglass*, 9 N. Y. 444; *F. Co. v. Hyde Park*, 97 U. S. 659; *Newton v. Comrs.*, 100 id. 561; *Rice v. A. & N. R. R. Co.*, 1 Black, 358; *S. C. Co. v. Wheeley*, 2 B. & Ald. 792; *Gildart v. Gladstone*, 11 East. 685; *K. D. Co. v. LaMarche*, 8 B. & C. 42; *L. & L. Canal v. Huster*, 1 id. 424; *Priestly v. Foulds*, 2 Scott's N. R. 205; *P. B. Co. v. Nance*, 6 id. 823; *Barrett v. S., etc., R. Co.*, 3 Scott, N. R. 803; *Blackmore v. G. C. Co.*, 1 M. & K. 154; *Scales v. Pickering*, 4 Bing. 452; *Bradley v. N. Y. & N. H. R. R. Co.*, 21 Conn. 294; *H. Bridge v. U. F. Co.*, 29 id. 210; *Dugan v. B. Co.*, 27 Pa. 303; *Comm. v. E. & N. R. R. Co.*, 27 Pa. St. 339; *Allegheny v. O. & P. R. R. Co.*, 26 id. 355; *Comm. v. C. P. R. Co.*, 52 id. 516; *R. & G. R. R. Co. v. Reid*, 64 N. C. 158; *B. Co. v. H. Co.*, 13 N. J. Eq. 81; *B. G. R. R. Co. v. W. Co.*, 10 Bush, 771; *M. S. Bank v. Dunkirk*, 54 Ala. 471; *F. R. R. Co. v. P. R. R. Co.*, 10 Fa. 145; *Mayor, etc. v. D. D. R. R. Co.*, 112 N. Y. 140; *Dermott v. State*, 99 id. 107.) A cardinal rule in the interpretation of statutes is that the intention of the law-makers is to control. (*Peo. ex rel. v. Comrs.* 95 N. Y. 558; *Peo. ex rel. v. Lacombe*, 99 id. 43.) The act of 1874, interpreted in the light of the foregoing principles, does not relieve the defendant from the obligation to pay the consideration stipulated for in the original concession of its franchise. (*In re Knaust*, 101 N. Y. 193; *Mark v. State*, 97 id. 572.) If the act of 1874 be deemed to comprehend an intent to release the defendants from payment of the license fees imposed by the terms of the original concession, it becomes to that extent unconstitutional. (Const. of N. Y., Art. 3, § 16; *S. M. Ins. Co. v. Mayor, etc.*, 8 N. Y. 253; *Town of Fishkill v. P. R. Co.* 22 Barb. 634; *People v. Hills*, 35 N. Y. 449; *People v. O'Brien*, 38 id. 193;

Opinion of the Court, per HAIGHT, J.

Huber v. People, 49 id. 132; *People v. Comrs.*, 53 Barb. 70; *People v. Allen*, 42 N. Y. 404; *Gaskin v. Meck*, 42 id. 186; *Astor v. N. Y. A. R. Co.*, 22 N. Y. S. R. 1; *People v. Sturtevant*, 9 id. 263; *Davis v. Mayor, etc.*, 14 id. 506; *Milhau v. Sharp*, 27 id. 611; *Mayor v. S. A. R. R. Co.*, 32 id. 261; *S. A. R. R. Co. v. Kerr*, 72 id. 330; *Fletcher v. Peck*, 6 Cranch, 87, 135; *People v. O'Brien*, 111 N. Y. 49; *Dartmouth College v. Woodward*, 4 Wheat, 518; *Tomlinson v. Jessup*, 15 Wall, 454, 457; *New Jersey v. Yard*, 95 U. S. 104, 113; *Commr. v. Essex Co.*, 13 Gray, 239, 253; *Webb v. Mayor, etc.*, 64 How. Pr. 10.)

HAIGHT, J. This action was brought to recover the amount of license fees alleged to have become due to the plaintiff for or in respect to passenger cars run by the defendant on its railroad, in the city of New York, during the years 1875 to 1881 inclusive.

The defense was, that the Legislature had relieved the defendant from any obligation to pay such license fees.

On the 6th day of September, 1851, the plaintiff entered into a contract with John Pettigrew and others, as parties of the second part, in and by which they were given the authority and consent of the common council to lay a double-track railroad from a point at the intersection of Chambers street and West Broadway, in the city of New York, along West Broadway to Canal street; thence along Canal street to Hudson street; thence to Eighth avenue; thence through Eighth avenue to Harlem river.

It was agreed on the part of the parties of the second part, that each of the passenger cars to be used on said road should be annually licensed by the mayor, and that they should annually pay for such license such sum as the common council may thereafter determine. It was further agreed on the part of the parties of the second part, that they would, within ten days after the execution of the agreement, organize themselves into an association or company to be called The Eighth Avenue Railroad Company, for the purpose of constructing, operating and man-

Opinion of the Court, per HAIGHT, J.

aging said railroad. Such association having been organized, the defendant's railroad was in part constructed prior to the passage of chapter 140 of the Laws of 1854. Thereafter, and on the first day of January, 1855, the association was incorporated under and by virtue of an act to authorize the formation of railroad corporations and to regulate the same, passed April 2nd, 1850, and the act amending the same; and also by virtue of an act of the Legislature, entitled an act relative to the construction of railroads in cities, passed April 4th, 1854, being the act to which allusion has already been made.

The common council having fixed the license fee for two-horse cars at fifty dollars per year, and one-horse cars at twenty-five dollars, the same was paid by the defendant from the year 1860 down to and including the year 1874. In that year, the Legislature passed chapter 478, entitled "An act to require The Eighth Avenue Railroad Company to extend its railroad route in the city of New York, and to regulate the use and operation of the railroad of said company." By this act it was, in substance, provided, that the Eighth Avenue Railroad Company should extend its existing railroad tracks from their then terminus in Eighth avenue through that avenue to its intersection with Macomb's Dam road; thence through and along that road to the westerly end of the bridge known as the Macomb's Dam bridge. That it should run its cars over such extended route for the convenience of passengers and should receive the same fares as at that time charged and no more. The second section provides as follows: "When the extension required by this act shall be completed and put in operation, said company shall use and maintain and operate its railroad, during the term for which said company was incorporated, upon and along the several streets and avenues in the city of New York, upon and over which its railroad is now in use and operation, and upon and over such extension *subject only to the provisions of the General Railroad Act of this state with its amendments, which shall be applicable to the railroad and extension hereby granted except as herein provided.*"

The defendant, having complied with the provisions of this

Opinion of the Court, per HAIGHT, J.

act, claims that the General Railroad Act does not require it to pay any license fee, and that, under the provisions of the section quoted, it is relieved of all obligation to pay the plaintiff the license fee contracted for.

Our first duty, therefore, is to construe and determine the meaning of this provision. If, as is contended, the defendant may operate its road subject only to the provisions of the General Railroad Act, and is relieved of all conditions not appearing therein, it follows that it is relieved also of the condition that it should only propel its cars by horse power, and it could, if it saw fit, propel them by the power of steam. It, therefore, becomes important to determine if such a result was intended by the Legislature.

Assuming that by the expression, "The General Railroad Act of this State," chapter 140 of the Laws of 1850 were intended, although there are other railroad acts which are general in their provisions, it includes all amendments thereto, and we understand the word "amendments" in this connection to refer to all acts which, in effect, amend, modify or limit the provisions of the general act. That all acts *in pari materia* are to be taken together as if they were one law, and to be compared in their construction because they are considered as framed upon one system having one object in view. (Potter's Dwarrris on Statutes, 189; Sedgwick on the Construction of Statutory and Constitutional Law, 209.)

Under the general act a railroad corporation may construct their road across, along or upon any street, which the route of its road shall intersect or touch, upon obtaining the consent of the common council of the city. (*Schaper v. B. & L. I. C. R. Co.*, 4 N. Y. S. R. 860.)

It may take and convey persons and property on its road by the power or force of steam. Chapter 140 of the Laws of 1854 does not, in express terms, amend the provisions of the general act, but it does provide that the common council of the several cities shall not thereafter permit to be constructed in either of the streets or avenues of the city a railroad for the transportation of passengers, which commences and ends in the city,

without the consent and authority of a majority in interest of the owners of property upon the streets in which the railroad is to be constructed being first had and obtained. So that after the passage of this act a railroad company, organized under the provisions of the general act, where its road commences and terminates in the city, as does the defendant's road, no longer has the right to construct its road along or upon the streets of the city without first complying with the conditions imposed by the provisions of the latter act. It is an act *in pari materia* with the general act, and, in effect, amends, modifies and qualifies its provisions, and is, therefore, one of the acts subject to the provisions of which the defendant holds and operates its road under chapter 478 of the Laws of 1874.

Again, it will be observed that the act of 1854 is general in its provisions, applying to all of the cities in the state. It is one of the acts under which the defendant was incorporated. It is the act by which it acquired its grant or right to construct and operate its road, as we shall subsequently show. The act of 1874 does not amend or repeal any of the provisions of this act. It consequently appears to us that they are left standing with their full force and effect. Under the act of 1854 the common council of the city where the consent of a majority of the property owners has been obtained, is given the power to grant authority to construct and establish a railroad upon or in its street or streets, upon such terms, *conditions* and stipulations in relation thereto as the common council may see fit to prescribe. Thus it may prescribe that the company shall propel its cars with horses instead of steam. It may regulate the manner in which the rails shall be laid and the streets kept in repair. It may also prescribe as a condition of the grant that the company pay a license fee for the cars that it runs upon its road. (*Mayor, etc., v. B. & S. A. R. R. Co.*, 97 N. Y. 275.)

Conditions of this character were prescribed in the grant that was made, that now vests in the defendant, which it accepted, recognized and performed up to the time of the passage of the act of 1874.

It is urged however that these conditions were void for the reason that the common council had no power to make the grant in question. At the time the grant was made this was undoubtedly true. (*Davis v. Mayor, etc.*, 14 N. Y. 506; *Milhau v. Sharp*, 27 id. 611.)

But the act of 1854, to which we have already referred, ratified and confirmed the grants, licenses, resolutions and contracts made by the common council, so that thereafter they became good, valid and binding. It is under the provisions of this act that the grant to construct and operate a railroad in the streets named was made valid. It is the act under which the defendant was incorporated and took title to its property and franchises. The same words which confirmed the grant confirmed the contract, and if one is made valid the other must be also.

Upon the argument of this appeal questions were discussed involving the validity of the act of 1874 under the Constitutions of the United States and of the state of New York, which questions we do not deem it necessary to here consider, for, under the view which we take of the act of 1874, there is nothing which limits, repeals or modifies the act of 1854, and that the defendant holds and operates its road subject to the provisions of the general act as modified and qualified by the provisions of that act.

Nor do we think that the fact that the common council had passed an ordinance imposing a penalty for a failure to procure a certificate for a license operates to prevent the plaintiff from maintaining its action to recover the license fee. The right to maintain such action was affirmed in the case of *Mayor, etc., v. B. & S. A. R. R. Co.* (*supra*).

Nor do we think that case distinguishable from the one under consideration on account of the provision in that case that the company was bound to pay the license fee by virtue of the special provisions of its charter, independent of the ordinance of the common council, for in this case, under the provisions of the contract, which became valid under the act of the Legislature to which we have referred, it was expressly

Statement of case.

agreed that the company should pay the license fee thereafter to be fixed by the council.

It consequently follows that the judgment should be affirmed, with costs.

All concur, VANN, J., in result.

Judgment affirmed.

SAMUEL D. HOYT, Respondent, v. THE NEW YORK, LAKE
ERIE AND WESTERN RAILROAD COMPANY, Appellant.

In an action to recover damages for personal injuries sustained by plaintiff, in being thrown from a loaded wagon, the hind wheel of which ran into a hole at a crossing on defendant's road, which the complaint alleged was caused by its negligence; defendant claimed that a defect in the wagon caused, or contributed, to the injury. It attempted to show that, in consequence of the alleged defect, in turning the wagon with a load upon it the next day after the accident it came near upsetting; this was excluded. *Held*, error.

The court, in its charge, stated to the jury "that they were not to understand that contributory negligence means any error of judgment," and that "mere error of judgment as to what particular part of the crossing he would drive this loaded wagon over could not be called negligence." *Held*, error; that the judgment required to be exercised is that of a man of ordinary prudence, and the charge should have been limited to an error of judgment such a man might have fallen into.

(Argued October 22, 1889; decided January 31, 1890.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made December 14, 1886, which affirmed a judgment in favor of plaintiff, entered upon a verdict and affirmed an order denying a motion for a new trial.

This action was brought to recover damages for injuries alleged to have been caused by defendant's negligence.

The complaint alleged, among other things, that on the 17th day of October, 1883, while the plaintiff was traveling in a careful and prudent manner with his team, wagon and a load of straw thereon, along one of the streets in the village of Middletown, and upon the crossing of the defendant's rail-

Statement of case.

road over said street, the hind wheel of plaintiff's wagon was forced into a hole in said street, at the side of the planking of said crossing outside the rails of the defendant's road, which hole was caused by defendant's neglect, and that in consequence of the hind wheel of the wagon going into said hole, the load of straw, carrying plaintiff with it, was tipped off said wagon and the plaintiff was injured.

With other allegations, the defendant's answer denied the defendant's negligence, and alleges the plaintiff's negligence caused or contributed to plaintiff's injury.

Lewis E. Carr for appellant. It was error to reject the evidence offered by the defendant to show that the village of Middletown had, through its proper officers, always, prior to the time of this accident, kept the street in repair up to the edge and level of the plank outside of the outer rail of the railroad track. (*Requa v. City of Rochester*, 45 N. Y. 129, 135; *Pomfrey v. Village of Saratoga Springs*, 104 id. 459, 465; *Seaman v. Mayor, etc.*, 80 id. 239, 242, 243; *Masterson v. Village of Mount Vernon*, 58 id. 391; *Carpenter v. City of Cohoes*, 81 id. 21; *Lowery v. R. R. Co.*, 76 id. 28, 32; *Wooley v. Grand St. R. R. Co.*, 83 id. 121, 127; Laws of 1850, chap. 140, § 28; Laws of 1880, chap. 133; 3 R. S. [8th ed.], 1751; Laws of 1832, chap. 224, § 13; *Babcock v. R. R. Co.*, 20 Wkly. Dig. 477; *Sewell v. City of Cohoes*, 75 N. Y. 45; *Wilson v. City of Watertown*, 3 Hun, 508; *Village of Port Jervis v. F. Nat. Bank*, 96 N. Y. 550; *City of Rochester v. Montgomery*, 72 id. 67; Laws of 1855, chap. 255, § 1.) It was error to exclude the testimony offered by the defendant to show that the day following this accident with the same team, driver, wagon, rigging and a load, there was difficulty that came near upsetting the load, resulting from the bolster, when turning shortly, falling down behind what are called the "hounds," and thus preventing the wagon with its load from being straightened safely. (*Quinlan v. City of Utica*, 11 Hun, 217; 71 N. Y. 603; *Ewell v. Mayor, etc.*, 1 J. & S. 126; *Avery v. City of Syracuse*, 29 Hun, 537;

Statement of case.

Pomfrey v. Village of Saratoga Springs, 104 N. Y. 459, 469; *Smith v. Lapham*, 87 id. 631; *Machen v. L. Ins. Co.*, 25 A. L. J. 496.) The motion for a non-suit should have been granted; there was no proof of a defect which resulted from a failure of the defendant to perform its duty. (*People v. N. Y. C. & H. R. R. Co.*, 74 N. Y. 302, 305; *Master-son Case*, 84 id. 247; *Payne Case*, 83 id. 572; *Wasmer Case*, 80 id. 212; *Gale Case*, 76 id. 594; *Judson v. N. Y. & N. H. R. R. Co.*, 29 Conn. 434; *Lowry Case*, 76 N. Y. 28; *McMahon Case*, 75 id. 231, 236; *Mazette v. R. R. Co.*, 85 id. 572; *Ring v. City of Cohoes*, 77 id. 83; *Hofnagle v. R. R. Co.*, 55 id. 608; *Lane v. Wheeler*, 35 Hun, 606; *Taylor v. City of Yonkers*, 105 N. Y. 202, 209.) There was error in charging the jury that any error of judgment did not constitute contributory negligence. (*Callahan v. Sharp*, 27 Hun, 85; *Belton v. Baxter*, 54 N. Y. 245; *Keese v. R. R. Co.*, 67 Barb. 205; *Morrison v. R. R. Co.*, 56 N. Y. 302; *Hunter v. R. R. Co.*, 112 id. 371; *Connolly v. R. R. Co.*, 88 id. 346; *Becht v. Corbin*, 98 id. 658; *Griffin v. Mayor, etc.*, 9 id. 456; *Minick v. City of Troy*, 83 id. 514, 517; *Durkin v. City of Troy*, 61 Barb. 437; *Evans v. City of Utica*, 69 N. Y. 166, 167; *Chapman v. R. R. Co.*, 55 id. 579; *Knupfle v. Ice Co.*, 84 id. 488; *Canfield v. R. R. Co.*, 14 J. & S. 238; *Walton v. Wise*, 47 id. 515; *People v. Kelley*, 35 Hun, 295, 302; *Driggs v. Phillips*, 103 N. Y. 77, 82.) The court erred in refusing the defendant's request to charge, that if the jury believed, from the testimony, the load did not upset until the wagon was entirely on the plank of the crossing, there could be no recovery because there was no proof of defect except at the edge of the plank. (*Hayes v. R. R. Co.*, 97 N. Y. 259; *Hofnagle v. R. R. Co.*, 55 id. 608; *Culhane v. R. R. Co.*, 60 id. 133; *Terry v. R. R. Co.*, 22 Barb. 574; *Reynolds v. R. R. Co.*, 58 N. Y. 248; *Edwards v. R. R. Co.*, 99 id. 245.) The court erred in admitting testimony as to repairs at this place after the accident. (*Dougan v. T. Co.*, 56 N. Y. 1, 8; *Salters v. Canal Co.*, 3 Hun, 338; *Corcoran v. Village of Peekskill*, 108 N. Y. 151, 155.)

Statement of case.

W. F. O'Neil for respondent. It is the duty of a railroad corporation, both under the statute and upon common law principles, to keep its road at a crossing in safe condition, so that a traveler upon the highway, exercising ordinary care, can pass over the same in safety. (*Gale v. N. Y. C. & H. R. R. Co.*, 70 N. Y. 594; *Warner v. R. R. Co.*, 80 id. 212; *Payne v. R. R. Co.*, 83 id. 572; *Masterson v. R. R. Co.*, 84 id. 247; *Gale v. R. R. Co.*, 76 id. 594.) Whether, therefore, the plaintiff properly and carefully managed and controlled his horses and approached the crossing with due care and prudence, were questions pre-eminently for the jury. (*Ernst v. H. R. R. Co.*, 35 N. Y. 10; *Clark v. U. F. Co.* Id. 485; *McCarty v. City of N. Y.*, 67 id. 602; *Gale v. R. R. Co.*, 76 id. 594.) A witness on cross-examination may be asked if he had made statements inconsistent with his testimony upon the trial; or if he had made statements out of court explanatory of his reason for testifying, in order to affect his credibility as a witness. (*Schell v. Plunt*, 55 N. Y. 592.) The court is not bound to accept the words of counsel, and so to charge when he has already in other and appropriate language given the jury the true rule by which it is to be governed. (*Stanley v. Webb*, 8 N. Y. Wkly. Dig. 444; *De Wolf v. Williams*, 69 N. Y. 623; 105 id. 164; *Caldwell v. N. J. S. Co.*, 47 id. 282; *Rexter v. Starin*, 73 id. 601.) An individual or corporation, who assumes the sole direction and authority over property, is liable to a person injured for any omission of duty in its management. (*Sewall v. City of Cohoes*, 75 N. Y. 45; *Jewhurst v. City of Syracuse*, 108 id. 303.) It was immaterial who had charge of "North street," or who had graveled it; whether the person whose duty it was had well cared for the streets of Middletown, was not pertinent to the issue. (50 N. Y. 203; *Masterson v. N. Y. C. & H. R. R. Co.*, 84 id. 247, 255; *Webster v. H. R. R. Co.*, 36 id. 39; *Colegrove v. N. Y. & N. H. R. R. Co.*, 20 id. 292; *Lovell v. Prop. of Locks, etc.*, 104 Mass. 18.)

Opinion of the Court, per POTTER, J.

POTTER, J. The trial of the action under the pleadings involved the negligence of both the plaintiff and defendant, and the evidence upon the trial had mainly relation to those issues. The only errors assigned by the appellant that I deem it necessary to examine in disposing of this appeal, relate to the rejection of some evidence offered by the defendant, upon the subject of plaintiff's contributory negligence and the charge in respect to the standard of judgment required in this class of cases. Evidence was given upon the trial of the case tending to show the height and width of the load of straw and the extent of the projection of the shelving beyond the sides and the direct supports of the body of the wagon. Evidence was also introduced, showing that the wagon was driven upon a curve from the street upon platform scales at the side of the street for the purpose of weighing the load and after the load was weighed, the wagon was driven by a reverse curve upon the crossing and that while the wheels of the wagon were following this reverse curve, or, in other words, while the wagon was being cramped, the horses and forward wheels of the wagon were upon the crossing and at this stage of the proceedings the hind wheel of the wagon was driven into the hole or depression at the side of the plank across the roadway and the load of straw slid off.

It is well known to every practical wagoner that in cramping a farm wagon, that the plane of the base on which the bolster rests is much shortened, and that if the wagon is cramped to any considerable extent one of the forward wheels strikes and raises the side of the body of the wagon on the one side, while the support of the opposite side is shortened, and that the more the load overhangs the sides of the wagon the more the level of the wagon is disturbed. To avoid this effect, there is usually a support called a hound, extending back some little distance, to prevent the end of the bolster from dropping too low and upon which the bolster may slide back to its larger base, as the occasion for cramping ceases and the forward wheels of the wagon get into line with the hind wheels. But sometimes the bolster, through defect in itself or of the

Opinion of the Court, per POTTER, J.

hound, drops over the end of the hound and prevents the return of the bolster to its base and the restoration of the body of the wagon to a level. The defendant sought to show that the inclination of the wagon, which caused the load to slide off, was occasioned by reason of the dropping of the bolster over the end of the hound. If the jury should find that a defect in the bolster and hound caused the inclination or contributed to increase the inclination caused by the settling of the hind wheel into the hole, such finding would constitute a defense to the action. With a view to the proof of that fact, the defendant proved that on the next day, the same driver with the same team, wagon and shelving was engaged in drawing cornstalks in a cornfield. The defendant then offered to show what occurred the next day when there was a load of cornstalks on the wagon, and also that they had trouble which came near upsetting their load. This was objected to as *immaterial* and the court excluded the proof, at the same time remarking, "You may show anything about *its being out of order*, but that they met with an accident the next day is not competent." The defendant then asked: "Did you have any difficulty with regard to the wagon when there was a load on it the next day?" Upon objection this question was excluded and defendant's counsel excepted. The defendant's counsel then asked this question: "On the next day when a load was on, did the bolster drop down behind the hound, so that the wagon came near upsetting in the effort?" This was objected to and excluded and the defendant excepted.

It will be observed by comparing this question with the preceding ones that the point of the question is changed. The point of the last question is whether the bolster caught behind the hound and that the wagon was thereby nearly upset. The court had just held that the defendant might show that the wagon was out of order. I think with the court below, that the defendant should have been allowed to show that the bolster caught behind the hound. That was doubtless the view of the court below, but in the haste and confusion pro-

duced in the mind of the court by reason of the interposition of undiscriminating of the last question was lost sight of former questions had been changed the last question was whether the bolster hound and whether while it was in the cornfield nor with a load of cornstalk turning with a load upon the wagon, by the hound, the wagon was not, as it

It seems to me that the learned trial judge was in error in excluding the answer to the question.

I think, moreover, that that question should have been allowed for this additional reason, that it would serve the purpose of eliciting evidence of the witness Cantine, in the effect that some two years afterwards with the wagon at the place of the accident, with a load upon it, the wagon was cramped without any difficulty. But I prefer the broader ground, that the defendant's contention that the defect of the wagon in respect to the load and that such defect tended in theory to overturn the wagon and thus put the numerous class of cases that where a defect of that fact may be legitimately strengthened by similar effects both before and afterwards which form the subject of the testimony of *Utica*, 11 Hun, 217; 74 N. Y. 603; 55 Me. 438; *Dougan v. C. T. Co.*, 56 Westmoreland, 52 N. H. 401; *Croche*, 56 N. Y. 656; *Kent v. Lincoln*, 32 Vt. etc., 17 J. & S. 126.)

I am also of the opinion that the learned judge was in error in his charge in reference to the testimony of the witness Cantine, that subject was principally in view of the manner of the crossing, and whether the

Statement of case.

line or were cramped and out of line, and whether the proper and safe part of the crossing was selected by the driver upon this occasion. The learned judge charged the jury in that regard "that they were not to understand that contributory negligence means any error of judgment."

Again the learned judge charged the jury "but mere error of judgment as to what particular part of the crossing he would drive this loaded wagon over, could not be called negligence." This I am disposed to think was erroneous. The judgment that is required to be exercised is the judgment of a man of ordinary and common prudence. The judgment of an imbecile or idiot will not suffice unless such judgment accords with the standard above indicated.

The defendant excepted "to so much of the charge as says that contributory negligence is not made out by showing error of judgment as to the part of the crossing he would drive over."

The error of judgment referred to in the exception is not necessarily the error of judgment of a man of ordinary prudence and the judge did not follow this expression "of an error of judgment" with the explanation which followed the former expression or with any qualification whatever.

For these errors I think the judgment should be reversed and a new trial granted with costs to abide the event.

All concur, except BRADLEY J., dissenting and BROWN, J., not sitting.

Judgment reversed.

JAMES FOLTS, Appellant, v. THE STATE OF NEW YORK,
Respondent.

Under the provisions of the act of 1870 (Chap. 321, Laws of 1870), limiting the time for filing claims against the state to two years from the time the damages accrued, when a claim is presented and proved for continuous damages, part accruing within the two years, the claimant is entitled to recover the damages so accruing; it is only such damages as accrued before that time which are barred by the statute.

It seems, under the provision of the act of 1883 (§ 10, chap. 205, Laws of 1883), establishing the board of claims, which authorizes an appeal to

Opinion of the Court, per POTTER, J.

this court from an award by said board when the amount in controversy exceeds \$500, the amount in controversy is the amount of the claim presented, or the amount which the board of claims may legally award the claimant under the proofs, including interest, in a proper case for the allowance of interest.

(Submitted January 15, 1890; decided January 31, 1890.)

THE nature of the appeal and the facts, so far as material, are stated in the opinion.

J. B. Rafter for appellant. The board of claims had jurisdiction to hear and determine the claim. (*Clement v. State*, 105 N. Y. 621; *Heacock v. State*, Id. 246; *Collins v. State*, Id. 641; *Reed v. People*, 13 N. Y. S. Rep. 815.) The statute of limitations is not a bar, to the whole at least, of the claimant's claim. (*Reed v. People*, 13 N. Y. S. Rep. 815; 8 id. 172; *Arnold v. H. R. R. Co.*, 55 N. Y. 661; *Corkings v. State*, 99 id. 499; *McMaster v. State*, 103 id. 555.) The damages and injuries complained of were continuing damages during the years stated. (*Heacock v. State*, 105 N. Y. 252.)

John W. Hogan, deputy attorney-general, for respondent. The amount in controversy is not sufficient to give this court jurisdiction of the appeal, and the appeal should, therefore, be dismissed. (*Lewis v. State*, 96 N. Y. 71; *Laws of 1870*, chap. 321; *Laws of 1883*, chap. 205; *Reed v. State*, 108 N. Y. 407.) This court has no jurisdiction to review the award or order made by the board of claims. (*Chaphe v. State*, 117 N. Y. 511; *King v. Galvin*, 62 id. 238; *Roosevelt v. Linkert*, 67 id. 447; *Brown v. Sigourney*, 72 id. 122; *Van Gelder v. Sigourney*, 81 id. 128; *Knapp v. Deyo*, 108 id. 518.)

POTTER, J. This is an appeal from an order made by the board of claims on the 10th day of June, 1885, dismissing the claims of the appellant, upon the ground that it appeared upon the face of the claims that they were barred by the statute of limitations, and that the board of claims had not jurisdiction to hear and determine the same.

Opinion of the Court, per POTTER, J.

The claims were in due form and verified, and were duly presented on the 9th day of December, 1878, to the canal appraisers and filed under the law then in force, and not having been heard or determined under such law, were transferred under the act, chapter 205 of the Laws of 1883, to the board of claims, and were by this tribunal heard and determined by dismissing the entire claim as above stated.

The question to be determined upon this appeal, therefore, is whether all the claims of the appellant were barred by the statute of limitations.

The claims presented were for damages to the claimant's land, to the trees growing thereon and his well of water located thereon, for labor in making and raising a roadway thereon above the wet soil, and digging ditches to carry off the water which flowed thereupon from the respondent's canal, and the fences injured or carried away by the same, and the temporary use and occupation of the claimant's lands by the respondent, its officers and employees, in making repairs to the canal, the injury to the grass thereon and the removing therefrom the debris left by the respondent.

From the respondent's points it appears that while, at and before the time of making the award upon these claims, it had been held by the board of claims that damages arising from a continuing injury caused by the canal were barred by the statute of limitations, unless filed within two years from the time when the damages first accrued; the Court of Appeals has, since the award in this case was made, held that a party presenting and proving a claim for continuing damages is entitled to recover for the damages accruing within the period of the two years immediately prior to the time of filing the claim. (*Reed v. The State of N. Y.*, 108 N. Y. 407.)

The respondent concedes, under this holding, that the board of claims erred in dismissing the entire claim, and that that court should have awarded the appellant a portion thereof, at most the sum of \$213.50, and that as this sum is less than \$500, the amount that is necessary to give this court jurisdiction, this court should dismiss the appeal and thus deprive the

appellant of the sum, or of an opposite result, which the counsel for the state concedes to the appellant.

It was no doubt pretty hard upon the appellant, but the court ruled that he was not entitled to a judgment against the state, because he had not demanded a judgment, or, in the language of Judge EARLE (99 N. Y. 499), "when the state has no limitation more than the statute of limitations." It is no harder still that a claimant, whose claim is barred upon the statute of limitations, if the claimant be allowed to defeat the portion of the claim barred by the statute of limitations cannot defeat, by having a judgment against the state, the reason that that portion of the claim is barred by §500, and that, too, in a case between a claimant and the state standing *in loco parentis*.

If the concession or the assumption is made that the statute of limitations cannot bar a claim against the state, it would seem apparent that the State to have tendered a stipulation that the claimant, by accepting the award by allowing so much of the claim as the statute of limitations cannot defeat, or by allowing that portion.

But in the absence of such disposition by the claimant and the State, we must affirm the judgment of the court on the appeal.

Under the statute of 1870 (chap. 205), there can be no question that the court had jurisdiction of the claims presented against the state, if the proof should be presented, aside from the statute of limitations, and the claimant not contend to the contrary. The question presented is when the statute of limitations bars a claim against the state? Section 2 of the act of 1870 provides that the claimants "shall file their claims with the commissioners and appraisers within two years from the time the claims have accrued, but claims for damages

Opinion of the Court, per POTTER, J.

more than one year prior to the passage of this act shall be filed within one year from the date hereof." * * *

There can be no contention or difference of opinion that claims involved in this appeal must be presented within two years from the time damages accrued, and the Court of Appeals has held that, in the case of continuous injury, the damages accruing within the two years immediately preceding the time of filing the claim, are not barred by the statute. (*Colrick v. Swinburne*, 8 N. Y. S. R. 173, opinion by Judge ANDREWS; *Utne v. N. Y. C. & H. R. R. R.* 101, N. Y. 98.)

This conclusion requires that the award be reversed and the claim sent back to the board of claims for a rehearing.

It may not be amiss to add, upon the subject of dismissing this appeal, that we understand by "the amount in controversy," in section 10 of the act of 1883 (*supra*), to be the amount of the claim presented, or the amount which the board of claims may legally award the claimant under the proofs, including interest in a proper case for the allowance of interest.

Looking at the claim, with the dates as therein stated, and excluding those items which may be excluded, as shown by their dates not to be within the two years immediately preceding the time of filing the claim, the claimant *may* be awarded \$501, without including any interest, and if the proof given upon the hearing should show that some of the items, which now appear to be outside of the two year period, were, in fact, within that period, the board of claims, by the exercise of the power of amendment which it possesses, and the liberality with which claims of this character are to be treated, the award might be considerably above \$500. In any view of this appeal, the award should be vacated and the board ordered to rehear the claims.

All concur.

Ordered accordingly.

CHARLES DAVIS, Respondent, v. ISABELLA M. DAVIS et al.,
Impleaded, etc., Appellants.

The will of D. disposed of his real estate as follows: "I give and bequeath all my real estate in fee simple to my three sons" (naming them), "and the survivor and survivors of them in case either die before me without issue—and in case either die before me leaving issue, the share of such deceased child shall go to such issue." Two of the sons died before the testator, first H., who left three children, and thereafter J., who left no issue. In an action for partition of the real estate, *held*, that the surviving son took two-thirds and the children of H. one-third.

Reported below 44 Hun, 365.

(Submitted January 16, 1890; decided January 31, 1890.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon and order made the second Monday of May, 1887, which affirmed a judgment in favor of plaintiff, entered upon a decision of the Special Term of the County Court of Kings county.

The nature of the action and the facts are sufficiently stated in the opinion.

James R. Steers, Jr., for appellant.

George V. Brower for respondent. The Revised Statutes have not changed the law so far as it affects James Albert's interest. (R. S., chap. 6, tit. 1, § 52; *Mowatt v. Carow*, 7 Paige, 328; *Smith v. Pybus*, 9 Ves. 567; *Wylie v. Lockwood*, 86 N. Y. 291.)

PARKER, J. This action was brought for a partition of real property. The interlocutory judgment adjudged the plaintiff's interest in the real estate sought to be partitioned, to be an undivided two-thirds, and that of the three defendants, an undivided one-ninth each. A review of the judgment in such respect only is sought by this appeal.

The title of the parties to this action was acquired through the last will and testament of Henry Davis.

Opinion of the Court, per PARKER, J.

The devise was as follows: "After all my lawful debts are paid and discharged, I give and bequeath all my real estate in fee simple to my three sons, Henry Davis, Charles Davis and James Albert Davis, and the survivor and survivors of them in case either die before me without issue; and in case either die before me leaving issue, the share of such deceased child shall go to such issue."

Henry Davis died before the testator, leaving him surviving three children, the defendants in this action.

Subsequently, but before the death of the testator, James Albert Davis died without leaving issue. Of the three sons, therefore, Charles Davis alone survived the testator.

And the question presented is: What share did Charles Davis and the children of Henry Davis, respectively, take under the devise?

We think the devise admits of but one construction. Primarily it was to the three sons, but in the event of the death of either of the devisees without issue, then the devise was to the survivor or survivors of them. The word "survivor" in the connection in which it is used, relates to and is limited by a class of which the sons constitute the whole. It does not refer to the issue of one of that class. James Albert Davis having died without issue, the share intended for him vested in Charles Davis, the sole survivor, upon the death of the testator.

The will also provided that in the event of the death of a son leaving issue, the share of such deceased child shall go to such issue. Therefore, upon the death of Henry Davis, which occurred before the death of James Albert, as well as prior to that of the testator, his share was released to his children. As Henry Davis did not survive either the testator or James Albert, he did not take as survivor, and his children could only take the share devised to him, which was one-third.

As this view is in accord with that of the court below, the judgment should be affirmed.

All concur.

Judgment affirmed.

Statement of case.

118	413
186	617

NATHANIEL HOOPER et al., Respondents, v. WALTER S. BAILLIE et al., impleaded, etc., Appellants.

A general assignment for the benefit of creditors, relating solely to the property of a general partnership, all of which is personal, and reciting that it is made by the firm to which the firm name is subscribed by one of the partners, who declares in the certificate of acknowledgment "that he executed the same as and for said firm(giving its name) and under its authority and instructions of the members of said firm," is not void on its face by reason of the manner of its execution; such an assignment may legally be executed in the name of the firm, by one of the partners, if done with the oral assent of all.

Sutherland v. Bradner (116 N. Y. 410), distinguished.

In an action by firm creditors to set aside such an assignment, if the plaintiff desires to raise the question as to the assent of the other partners, it should be presented by the pleading.

If so presented, the burden is upon the plaintiff to establish that the assignment was executed without their assent.

In such an action the complaint alleged that the assignment was made with intent to defraud; this was put in issue by the answer. It appeared that the firm was engaged in business in New York, having a branch house in Brazil; it was composed of three partners, two of whom resided in New York, the other in Brazil. B., one of the New York partners, executed the assignment; J., the other, testified that shortly before its execution B. told him that if they did not get remittances from Brazil they would have to make an assignment; the witness answered "If we must do it, then we must;" also, that he did not remember any other conversation with B. in reference to the assignment, but would not swear there was none. Plaintiff also, after proving by the assignee that he saw a cable from W., the Brazilian partner, dated before the assignment, assenting to it without qualification, put in evidence a letter from W. to the assignee, to the effect that he confirmed by cable the assignment of the assets of the New York firm only, it being out of his power to do more, as under Brazilian law it was necessary to settle claims there before remittance of any moneys abroad. It also appeared, and the trial court found, that W., after converting the assets in Brazil into money and paying local claims, remitted the balance to the assignee. The referee also found that J. never objected to or questioned the assignment either before or after the execution. The assignee and one of the assignors, called as witnesses for the plaintiff, both testified that the assignment was made in good faith, and there was no evidence to the contrary. At the close of the evidence the defendants counsel requested the court to find the issue of fact in their favor; it refused, to which defendants excepted. The court found that the assignment was made

Statement of case.

without the authority or assent of J. and W., to which finding the defendants excepted. The court found as conclusion of law that the assignment was fraudulent and void as against plaintiffs. *Held*, that the findings were erroneous ; and that the refusal to find and the finding of fact, there being no evidence to sustain it were, under the exceptions reviewable in this court. (Code Civ. Pro. §§ 992, 993.)

(Argued January 16, 1890 ; decided January 31, 1890.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made May 13, 1887, which affirmed a judgment entered in favor of plaintiffs upon a decision of the court on trial at Special Term.

This action was brought to set aside an assignment for the benefit of creditors.

On and prior to May 17, 1884, Charles McCulloch Beecher, Frank R. Johnson and Walter S. Baillie, were partners under the name of C. McCulloch Beecher & Co. They were engaged in business as commission merchants at the city of New York, and had a branch house at the city of Rio de Janiero. Beecher resided at Brooklyn, and Johnson at the city of New York, and they had charge of the business in the city last mentioned. Baillie resided and had charge of the business at Rio de Janiero. The property of the firm was all personal, some of which was at New York, but the greater part of it was at Rio de Janiero. On the date mentioned the firm was insolvent, and Beecher executed in its name a general assignment for the benefit of creditors, by which all of its property was assigned to the defendant Henry P. Bartlett, in trust, to convert into money and first pay in full two creditors, after which all others were to be paid ratably. November 17, 1884, the plaintiffs recovered a judgment against the partners, on which an execution was returned wholly unsatisfied. June 6, 1885, this action to set aside the assignment as fraudulent was begun by personal service of the summons and complaint on all of the defendants except Beecher, who was not served, nor did he appear in the action.

Further facts appear in the opinion.

Statement of case.

C. E. Tracy for appellants. For the purpose of this action it was and is to be taken as true that both Johnson and Baillie had assigned their property by the assignment executed by Beecher. The complaint specifically charged, and their several answers admitted the making of the assignment. Their answers were in themselves a ratification of the assignment by them. (Code, § 522; *Tell v. Beyer*, 38 N. Y. 161; *Ballou v. Parsons*, 11 Hun, 602; *Fleischman v. Stern*, 90 N. Y. 110; *Fisk v. Evans*, 5 J. & S. 482; 60 N. Y. 640; *Gasper v. Adams*, 28 Barb. 441; *Southwick v. F. N. Bk.*, 84 N. Y. 420, 429; *Prindle v. Caruthers*, 15 id. 425-6; *Keteltas v. Myers*, 19 id. 231; *Thorp v. K., etc., Co.*, 48 id. 253-5; *Bates v. Rosekrans*, 23 How. Pr. 98.) There was an absolute failure of proof showing dissent from the assignment by either the defendant Johnson or Baillie. (*Baldwin v. Tynes*, 19 Abb. 32; *Roberts v. Shepard*, 2 Daly, 110; *Wells v. March*, 30 N. Y. 344; *Lowenstein v. Flauraud*, 11 Hun, 399; 82 N. Y. 494; *Klumpp v. Gardner*, 114 id. 153.) There was an utter absence of proof to sustain the two findings that they did not authorize or assent to the assignment. (*Roberts v. Shepard*, 2 Daly, 110; *Klumpp v. Gardner*, 114 N. Y. 153; Laws of 1887, chap. 466, § 28.) The judgment as entered was incorrect, in that it gave to plaintiffs a preference over all other creditors. The assignment was not set aside for fraud, but only for alleged irregularity. This gives the plaintiffs no preference over other creditors. (*Codwise v. Gelston*, 10 Johns. 507; *Corning v. White*, 2 Paige, 567; *Cox v. Platt*, 32 Barb. 126; *Kennedy v. Barandon*, 67 id. 209; Code, §§ 452, 786; *Coope v. Bowles*, 18 Abb. 442, 447.)

Franklin Bien for respondents. Where the pleadings do not conform to the evidence if the facts proved a good cause of action, and no objection is made to the evidence, the case will be disposed of on appeal as if the pleadings had been amended. (*Tying v. C. W. Co.*, 58 N. Y. 313; *Williams v. P. F. Ins. Co.*, 57 id. 274; *Sherman v. Parish*, 53 id. 488; *McKnight v. Devlin*, 52 id. 399; *Miller v. Schuyler*, 20 id.

Opinion of the Court, per FOLLETT, Ch. J.

524; *Cutlin v. Gunter*, 11 id. 368.) An assignment of partnership property with preferences, must be executed by all members of the firm; if not it is void. (42 Barb. 93; Story on Part., § 103; Burrill on Assignments, 37; 5 Paige, 30; 7 id. 26; 3 Sandf. Ch. 284; 3 Duer, 1; 15 How. Pr. 268; 2 Kern. 442; 1 Hoff. Ch. 513; 3 Sandf. Ch. 284; *Hayes v. Heyer*, Id. 293; R. S., chap. 3, tit. 5, § 9; Laws of 1873, chap. 807; *Hayes v. Heyer*, 3 Sandf. Ch. 293; 25 Hun, 79; 30 N. Y. 344.) This is an action by judgment creditors, after return of execution, to set aside a general assignment, and if they succeed they are entitled to a preference over other creditors on the assets in the hands of the assignee. (Code Civ. Pro., § 1873.)

FOLLETT, Ch. J. It is alleged in the complaint: "That the said assignment is null and void upon its face," but why it is so is not averred. It is argued in behalf of the respondents that it is so void because (1) the names of all of the partners are not disclosed in it, and (2) that it appears not to have been executed by all of the partners. The partners had no property except firm property, all of which was personal. A general assignment relating solely to the property of a general partnership, all of which is personal, executed solely for the benefit of creditors of an insolvent firm, and reciting that it is made "between the firm (stating its name), party of the first part," to which the firm name is subscribed by one of the partners, who declares in the certificate of acknowledgment "that he executed the same as and for said firm (giving its name), and under its authority and instructions of the members of said firm," is not void on its face by reason of the manner of its execution.

The assignment not being void on its face, the burden was on the plaintiffs to prove that it was void for reasons outside of the record. They alleged in their complaint as a reason for setting it aside, which is the only ground averred, except the one first considered, "That the said assignment was made by the defendants, Charles McCulloch Beecher, Frank R.

Opinion of the Court, per Fc

Johnson and Walter S. Baillie, with intent to hinder and defraud their creditors, accompanied by immediate and continued disposal of the property, but that the same was placed under the control of the said assignors, Paine Bartlett." The defendants, in testimony of the assignment was made with intent to defraud. On the trial the plaintiffs called as a witness one of the assignors, both of whom the assignment was made in good faith, and we find the contrary. At the close of the evidence the plaintiff requested the court to find the issue of fact in his favor, but the court refused to determine the refusal the defendants excepted, pursuant to the Code of Civil Procedure, and they in 1893 the refusal was error. The court of law, "That the said general assignment was and is fraudulent and void as against the plaintiff's action," which seems to have been based on the fact that the assignment was made without the consent of Johnson and Baillie. This finding was affirmed by the defendant pursuant to section 1000, which urges that it is without any evidence and is reviewable as a question of law. The complaint contained no intimation that the assignment was attacked on the ground that it was made by Johnson and Baillie, but, on the contrary, that it was made by all of the partners of the firm. Such an issue was presented by the plaintiff in establishing it was, as before stated, on the trial called Mr. Johnson, who testified: "I was present when the assignment was made; I had a conversation with reference to the making of this assignment, it being made; he told me two days before the assignment was made; not get remittances from Brazil we were not making the assignment; I said to him it is pretty hard to do it then we must; I had no conversation with him."

Opinion of the Court, per FOLLETT, Ch. J.

with reference to this assignment; I do not remember any other conversation, but I won't swear it was the only conversation I had with him." The plaintiffs called the assignee, who testified: "I think I saw a cable from Walter S. Baillie, dated about May 16th, 1884, to the firm of C. McCulloch Beecher & Co.; * * * I don't know the contents *verbatim*; as near as I recollect, Mr. Baillie assented to the assignment without qualification; I cannot use the words of the cable, but that is my remembrance." This cablegram was dated the day previous to the date of the assignment. The plaintiffs put in evidence a letter from Baillie to the assignee, dated June 28, 1884, which contains the following: "Dear Sir.—Your favor of the 24th ult. duly received on the 26th inst., addressed to the writer, to which we have to reply with all the information in our power.

"*First.* Let us correct you on your first remark that 'we had already been advised by cable Messrs. C. McCulloch Beecher & Co., New York and Rio have assigned to me all their business for the benefit of their creditors,' etc. So far as the writer is concerned, he confirmed in his cable of 16th ult. confirmation assignment available assets of the *New York firm only*, it being quite out of his power to do more than this. Brazilian law being most clear in stating the absolute necessity of first settling all claims on the spot before the remittance of any moneys abroad. This once accomplished, we will remit you as rapidly as possible all that remains over, subject only to the deduction of actual liquidated expenses." They also put in evidence a letter from Baillie to C. McCulloch Beecher & Co., dated May 24, 1884: "Since our respects of the 17th inst., we, on 20th, received your cable announcing your failure and the appointment of Mr. H. P. Bartlett as assignee. * * * At once on receipt of news of your suspension we consulted our lawyer as to our course to pursue, and he informed us that, by Brazilian law, all local debts must be settled before any remittances can be sent to New York towards settlement with United States creditors, and that, so far as this branch is concerned, our assets more than covering

Statement of case.

our local liabilities, we are simply liquidating the assets in accordance with the instructions from our head office." The defendant then converted the assets in Brazil into money and paid the same to the Brazilian creditors, as required by the terms of the assignment. The defendant then remitted the surplus to the assignee. The defendant's defence bearing upon the question of whether the assignment was valid, the defendant Baillie consented to the execution of a judgment against him, which does not tend to sustain the finding that the defendant had such an issue been raised by the trial court found "That said Frank R. Baillie did not to or questioned said assignment either before or after the execution and that said Walter S. Baillie, the defendant, said assignment, collected the assets of the estate in Brazil, and, after paying the indebtedness of said estate in Brazil, transmitted the balance to the assignee, Henry Paine Bartlett."

A general assignment of the assets of a firm for the benefit of creditors may be legally made by one of the partners, if done with the consent of all of the partners. (*Klumpp v. Sutherland*, 153.) The case at bar is not like *Sutherland* (N. Y. 410), in which an attempt was made to make an assignment by amendment after a credit had been obtained on the assigned property.

The judgment should be reversed as to the issues joined in the pleadings, or of such issues as may be amended pleadings granted, with costs to the defendant.

All concur.

Judgment reversed.

WILLIAM J. NORTHRIDGE, Appellant, v.
Respondent.

It seems it is only where the vendor in a contract for the sale of land is chargeable with bad faith that the vendor is liable upon breach of the covenant to convey, to recover the purchase money by the goodness of his bargain or the financial success or failure that have resulted from performance.

Statement of case.

The vendee, however, may recover back purchase-money paid by him and such expenses as he has reasonably incurred in examination of the title. The parties entered into a contract by which defendant agreed to convey to plaintiff certain real estate. It was known by plaintiff that defendant at the time had no title to the property; the latter contracted in good faith, relying upon a contract on the part of another to convey the premises to him, and both parties believed that defendant would acquire title before the time stipulated for the conveyance. Defendant was unable to perform by reason of the failure of the party who had agreed to convey to him to fulfill his contract. In an action to recover damages plaintiff recovered the expenses incurred in examining the title, with interest. *Held*, no error; that, although plaintiff was aware at the time of making the contract that defendant did not have the title, yet as both parties supposed he would obtain it, the reasonable expense of examining such title might be regarded as in the contemplation of the parties. *Dey v. Nason* (100 N. Y. 166), distinguished.

(Argued January 17, 1890; decided January 31, 1890.)

APPEAL from order of the General Term of the Court of Common Pleas in the city of New York, made the first Monday of May, 1887, which reversed a judgment in favor of the plaintiff, entered upon a verdict and granted a new trial.

The nature of the action and the facts are sufficiently stated in the opinion.

John J. Macklin for appellant. An appeal lies to this court from the order granting a new trial. (*Harris v. Burdett*, 73 N. Y. 136; Baylies on New Trials, 281.) The damages sustained by plaintiff in consequence of the defendant's breach were the moneys expended in the examination of title. (*Wohlfarth v. Chamberlain*, 6 N. Y. S. Rep. 207; *Cockroft v. N. Y. & H. R. R. Co.*, 69 N. Y. 201; *Sickel v. Cohen*, 7 N. Y. S. R. 54; *Moore v. Williams*, id. 83.)

Moore & Moore for respondent. It is submitted that the plaintiff's right to recover the expenses incurred by him as alleged in his complaint must rest upon one of the two grounds, fraud or warranty. Neither of which grounds are claimed or presented by the case at bar. The judgment against the defendant was properly reversed. (*Dey v. Nason*, 100 N. Y.

Opinion of the Court, per B

166; *Conover v. Weaver*, 20 id. 140; 40 id. 60-65; *Cockroft v. N. Y. & H* 204; *Frost v. Raymond*, 2 Caines, 188; *Abbott v. Allen*, 2 Johns. Ch. 523.) The must be expressed in terms and cannot *man v. Gardner*, 5 Johns. Ch. 32; 4 Cr. Eq. Rep. 311; *Hiern v. Mill*, 13 Ves. 1; *Dorsey v. Jackman*, 1 S. & R. 42.) must be a distinct allegation of the c is not deemed an issue, and cannot a John. Ch. 33-83; *James v. McKern* purchaser buying with full notice of not be relieved by the court. (13 S. 270, 276n; 2 Wheat. 13; *Craddock v. Hart v. Porter*, 5 S. & R. 204; *F Addis*. 9.)

BRADLEY, J. The action was brought for the alleged breach by the defend which he agreed to sell to the plaintiff, a full covenant warranty deed, certain p township of Raritan, county of Monno Jersey. At the time designated for t sale the plaintiff was ready to perform part, but the defendant was unable to premises, and a breach on the part of th at the trial. The plaintiff recovered \$8 amount of expenses incurred by the pl examination of the title to be made. At was made the defendant had no title relied upon the performance by another made about the same time, undertaken to to him, and it was by reason of the failu so that the defendant was unable to mak the plaintiff. The defendant made the c and had the purpose to perform it, an understood that the defendant did not ha

Opinion of the Court, per BRADLEY, J.

informed and believed, at the time the contract was made, that the defendant would be able to procure it before the stipulated time for performance.

The vendee in a contract for the sale of land is not ordinarily entitled, upon breach, on failure to convey, to recover of the vendor damages measured by the goodness of his bargain or the financial benefit which would result from performance, and it is only when the vendor is for some reason chargeable with bad faith in the matter that recovery beyond nominal damages on that account can be had. If the vendee has paid any of the purchase-money he may recover that back, and he may also recover such expenses as he has reasonably incurred in examination of the title to the property. This is the general rule. (*Conger v. Weaver*, 20 N. Y. 140; *Cockcroft v. N. Y. & H. R. R. Co.*, 69 id. 201; *Leggett v. M. Ins. Co.*, 53 id. 394.)

It is contended on the part of the defendant that the fact that it was known to the plaintiff, as well as the defendant, that the latter did not have the title when the contract was made, did not permit the plaintiff to charge the latter with the expense of looking up the title to the property. The implied warranty of title in the vendor, which usually attends an executory contract for the sale of real property (*Burwell v. Jackson*, 9 N. Y. 535), is not applicable to this case, as the plaintiff was advised that the defendant did not have it when he made the contract. But it is not seen that such fact necessarily has any importance upon the question under consideration. The expectation and belief on the part of the plaintiff of performance by the defendant, which must be assumed in this case, may have furnished the same reason to the plaintiff for ascertaining the condition of the title as would have existed and induced him to examine it, if the vendor had assumed to be the owner at the time he made the contract.

The vendee in such a contract as this is not required to take anything less than a good marketable title, and the precautionary means of ascertaining about it, by examination, before parting with the purchase-money and accepting conveyance,

Opinion of the Court, per BRADLEY, J.

are properly made available by way of protection, and unless an understanding in some manner appears to the contrary, the examination of the title by the vendee, and the reasonable expense of making it, may be regarded as in the contemplation of the parties and treated as properly incidental to the contractual situation, and consequently the amount of such expense may, in the event of failure of the vendor to convey, be deemed special damages resulting from the breach and recoverable as such. (*Bigler v. Morgan*, 77 N. Y. 312.)

While the facts alleged in the answer, if established, may have relieved the defendant from liability for this expense of investigating the title, the facts as represented by the evidence do not furnish any reason for the modification, as applicable to this case, of the doctrine before stated. The defense is not aided by *Dey v. Nason* (100 N. Y. 166). There the contract to sell and convey the land referred to in it never became binding as such, and whether it should become effectual was made dependent upon the approval by a third party designated by the contracting parties. And in that view Judge ANDREWS, in delivering the opinion of the court, very properly remarked: "If the defendants had owned the land described in the complaint, Tevis might not have approved of the exchange, in which case the same expense might have been incurred by the plaintiff and the same loss sustained of which he now complains." In the case at bar the contract was, so far as appears, made by the parties in good faith, and they respectively assumed the obligation to perform it. The consequences of the breach were such as to justify the result given by the trial court.

The order should be reversed and the judgment entered on the verdict affirmed.

All concur.

Ordered accordingly.

Statement of case.

JACOB L. VAN WYCKLEN, Appellant, v. THE CITY OF
BROOKLYN, Respondent.

Where an order of General Term reversing a judgment entered on a verdict states that the facts were not before that court for revision and that its decision was upon the law only, the legal questions are reviewable here. The opinion of a witness, upon the precise question the jury is to determine, is only competent when from the nature of the case the facts cannot be stated or described to the jury in such manner as to enable them to form an accurate judgment thereon, and no better evidence than such opinions is attainable.

To render the opinions of witnesses competent as evidence the subject must be one of science or skill, or one of which observation and experience have given opportunity and means of knowledge, which exist in reasons rather than descriptive facts, and, therefore, cannot be intelligently communicated to others, not familiar with the subject, so as to possess them with a full understanding of it.

Such testimony cannot be resorted to, therefore, where the facts can be placed before a jury, and they are of such a nature that jurors generally are as competent to form an opinion in reference to them as witnesses.

In an action to recover damages for injuries alleged to have been caused by negligence or wrongful acts of the defendant, expert testimony, to be competent, must be based on evidence in the case, and confined to the causes of the injury complained of.

In an action to recover damages for alleged diversion of the waters of Spring creek which furnished water power for plaintiff's mill, the claim of plaintiff was that the water was drained from the creek by certain driven wells put down by defendant on its lands near the creek, and from which it pumped water for the city supply. Defendant called as a witness one A., who was conceded to be an expert, and who constructed the wells in question. He described the manner of their construction, and stated that they drew water from a depth below the surface ranging from thirty-five to sixty feet. The depth of the wells varied, for the purpose of getting the benefit of the water in different water-bearing strata. He was then asked: "Was it possible for you to take in those pipes any water out of Spring creek?" This was objected to as "opinionative," and excluded. *Held* (FOLLETT, Ch. J., POTTER and HAIGHT, JJ., dissenting), no error.

Comm. v. Choute (105 Mass. 456); *Buffum v. Harris* (5 R. I. 248); *Detweiler v. Groff* (10 Penn. St. 377); *Phillips v. Terry* (3 Abb. Ct. App. Dec. 607), distinguished.

Van Wycklen v. City of Brooklyn (41 Hun, 418), reversed.

(Argued December 4, 1889; decided February 25, 1890.)

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Statement of case.

APPEAL from order of the General Term of the Supreme Court in the second judicial department, made July 27, 1886, which reversed a judgment in favor of the plaintiff entered upon a verdict, and granted a new trial.

The nature of the action and the material facts are sufficiently stated in the opinion.

William C. Dewitt for appellant. A mill-owner having title to the running water of a stream, by which his mill is operated, has a right of action against any person who has diverted such stream by any process which took the water after it had become a part of the open running water-course. Water, while under the earth, is a part of the realty; but water running in an ancient course upon the earth's surface is usufructuary property belonging in common to the owners upon its banks; and it matters not whether a stream be diverted by a dam built upon the surface of the earth, or by piers inserted underneath the surface, the liability is the same. (*Village of Delhi v. Youmans*, 45 N. Y. 362; *Garwood v. N. Y. C. & H. R. R. Co.*, 83 id. 404; *Smith v. Rochester*, 92 id. 463; *Burroughs v. Saterlee*, 25 The Rep. 204; *Gardner v. Newburgh*, 2 Johns. Ch. 162; 2 Kent's Comm. 439, 445; Angell on W. C. §§ 93, 95, 112; *Dexter v. P. A. Co.*, 1 Story, 387; Gould on Waters, §§ 263, 280, 281; Washburn on Easements, 247; *Ransom v. Taylor*, 33 Eng. L. & Eq. 428; *Broadbent v. Ramsbotham*, 34 id. 553; *Chasemore v. Richards*, 7 H. L. Cas. 349; *Pieley v. Clark*, 35 N. Y. 520; *Goodale v. Tuttle*, 29 id. 459; *Elles v. Duncan*, 21 Barb. 230; *Village of Delhi v. Youmans*, 45 N. Y. 363.) It is not competent for an expert in a cause where the final conclusion to be reached by the jury is to be drawn from a variety of facts, especially when those facts involve the laws and operations of nature falling under the observation of all mankind, to answer a question fixing that final conclusion and definitely and directly deciding the main question to be passed upon by the jury. (*Ferguson v. Hubbell*, 97 N. Y. 507, 512, 519; 1 Greenl. on Ev. § 440; *Van Deusen v. Young*, 29 N. Y. 37; *Hart v. H. R. R. Co.* 84

Statement of case.

id. 60; *Carpenter v. E. T. Co.*, 71 id. 579-580; *Ferguson v. Hubbell*, 97 id. 507, 512, 519; *Bennett v. Clemence*, 6 Allen, 10; *Hopkins v. I. & S. L. R. R. Co.*, 78 Ill. 32; *Morris v. East Huron*, 41 Conn. 252; *Barts v. Moore*, 126 Mass. 226; *May v. Bradlee*, 127 id. 414; *S. T. Co. v. Coover*, 26 Ohio St. 520; *States v. Rhodes*, 29 id. 171; 4 Greenl. on Ev. [14th ed.] 536; *Lincoln v. S. R. R. Co.*, 23 Wend. 425; *Brink v. H. F. Ins. Co.*, 80 N. Y. 116.) The witness had not been shown to be an expert, and upon this ground, the evidence was, of course, inadmissible. (*Hoyt v. L. I. R. R. Co.*, 57 N. Y. 678; *Nelson v. M. Ins. Co.*, 71 id. 460; *Terpenning v. C. E. Ins. Co.*, 43 id. 279; *Bedell v. L. I. R. R. Co.*, 44 id. 367; *Whele v. Haviland*, 42 How. 399; *Delafield v. Parish*, 25 N. Y. 38; *Slocovitch v. O. M. Ins. Co.*, 108 id. 56; *Nelson v. M. Ins. Co.*, 71 id. 460.) The objection was general in character, and the evidence being excluded, the ruling must be deemed to have been placed upon the right ground. (*Tooley v. Bacon*, 70 N. Y. 34, 37.) Upon all the facts of the case, it is manifest that the exclusion of the particular question did the defendant no harm, and hence it was error to reverse the judgment on that ground. (*Booth v. C. M. Co.*, 74 N. Y. 27; *Borden v. Stevenson*, 75 id. 164; *Moyer v. N. Y. C. & H. R. R. Co.*, 98 id. 645, 647; *Vandervoort v. Gould*, 26 id. 614; *Carpenter v. E. T. Co.*, 71 id. 580.)

Almet F. Jenks for respondent. An action will not lie against a city if it, in the work of sinking a well on its own lands, intercept the percolation of the underground currents of water, and thereby prevent such water from swelling the springs or open running stream on or running through the soil or land of another. (*Chasemore v. Richards*, 7 H. L. Cas. 349; *Village of Delhi v. Youmans*, 45 N. Y. 362; *J. C. Co. v. Veghte*, 69 id. 22; *Bloodgood v. Ayres*, 108 id. 403; *Acton v. Blundell*, 12 M. & W. 324; Angell on Water Courses, chap. 4, § 114.) Testimony of experts as to whether the machinery of its system could draw off the living waters, or whether it was only intended to draw the waters of the earth and could

Opinion of the Court, per BROWN, J.

suck up such waters only was admissible. (*Detweiler v. Groff*, 10 Penn. St. 377; *Moyer v. N. Y. C. R. R. Co.*, 98 N. Y. 645; *Koster v. Noonan*, 8 Daly, 231; *Hand v. Brookline*, 126 Mass. 324.) Where specific objection is made to evidence offered, every ground of objection not specified, which is capable of being obviated by evidence, is waived. (*Marston v. Gould*, 69 N. Y. 220; *Walsh v. Washington Co.*, 32 N. Y. 440-443; *Newton v. Harris*, 6 id. 345; *Durgin v. Ireland*, 14 id. 322; *Blossom v. Barrett*, 39 id. 434; *Moser v. Vose*, 67 id. 56; *Platner v. Platner*, 78 id. 95.)

BROWN, J. The plaintiff brought this action to recover damages which he claimed to have sustained from the diversion by the defendant of the waters of a stream called Spring creek, and there was a verdict in his favor at the Circuit.

The judgment on such verdict was reversed by the General Term, and the order of reversal states that the facts were not before that court for review and its decision was upon the law only. The legal questions arising in this case are, therefore, properly before this court. *Pharis v. Gere* (112 N. Y. 408).

The plaintiff was the owner of a grist mill situated near the junction of "Spring creek" with Jamaica bay, and he derived the power to drive the machinery of his mill from the flow of the tide of the bay, and the flow of the waters of the creek.

The defendant, pursuant to a statute of the State, had acquired title to a strip of land upon the banks of the creek, about two miles above the plaintiff's mill, and upon such strip of ground had constructed one hundred driven wells, from which it pumped water for the supply of the city. The nearest well to the creek was distant therefrom about two hundred feet, and the others were located at varying distances up to about six or seven hundred feet therefrom.

It was the claim of the plaintiff that these wells drained the water from the creek and arrested the same in running to the mill, thus diverting the living stream and impairing and injuring his water power; and there appears to have been a concession at the trial, and the same is made in this court,

Opinion of the Court, per BROWN, J.

that if, in sinking the wells on its own land, the city did no more than intercept the percolation of underground currents, and thereby prevented such water from running through the soil and reaching the stream, the action would not lie. And such is the law applicable to the case. (*Chasemore v. Richards*, 7 H. L. Cas. 349; *Village of Delhi v. Youmans*, 45 N. Y. 362, and cases cited.)

The question in issue, therefore, was, did the defendant by their wells and machinery draw the water out of the creek after it became an open running stream on the surface of the earth.

At the close of the plaintiff's case there was a motion by the defendant to dismiss the complaint "upon the ground that the evidence disclosed no liability on the part of the city," which motion was denied, the court holding that the evidence presented a question of fact for the consideration of the jury.

We do not understand the learned counsel for the city to claim that there was any error in the denial of this motion, and it was not made a ground of reversal at General Term.

It is sufficient for us to say, therefore, that we think the evidence was of a character to permit the conclusion drawn by the jury, and it would have been error for the court to have withdrawn the case from their consideration. The jury having determined the facts in favor of the plaintiff's contention, the judgement must stand unless there was error committed in the conduct of the trial.

The defendant called as a witness one William D. Andrews, who testified that his business was making and drilling wells and supplying water for cities and villages, and that he had constructed the wells in question. He described the manner of their construction, and stated that they drew water from a depth below the surface ranging from thirty-five to sixty feet, and that the depth of the wells varied for the purpose of "getting the benefit of the water in different water-bearing strata."

He was then asked the following question: "Was it possible for you to take in those pipes any water out of Spring creek?" This was objected to as "opinionative" and excluded, to which ruling of the court the defendant excepted.

Opinion of the Court, per BROWN, J.

The judgment was reversed by the General Term on the ground that this question should have been admitted, and the propriety of the ruling of the trial court in its exclusion is the main question presented on this appeal.

While we recognize fully the difficulty at times of deciding whether the case presented is one in which expert or opinion evidence is admissible, the majority of this court is of the opinion that the ruling of the trial judge was correct.

Within the general rule that witnesses who are skilled in science and art, and those who from experience and special study have peculiar knowledge upon the subject of inquiry which jurors have not, may testify not only to facts, but may also give their opinions as experts, the decisions of the courts have given a wide range to expert evidence.

No rule, however, can be made so precise as to include all cases, and each question as it arises must be determined by the application of general principles to the particular inquiry involved in the case before the court.

While it is no longer a valid objection to the expression of an opinion by a witness, that it is upon the precise question which the jury are to determine (*Transportation Line v. Hope*, 95 U. S. 297; *Bellinger v. N. Y. C. R. R. Co.*, 23 N. Y. 42; *Cornish v. F. B. F. Ins. Co.*, 74 id. 296), evidence of that character is only allowed when, from the nature of the case, the facts cannot be stated or described to the jury in such a manner as to enable them to form an accurate judgment thereon, and no better evidence than such opinions is attainable. (*Ferguson v. Hubbell*, 97 N. Y. 507; *Schwander v. Birge*, 46 Hun, 66; Greenl. on Ev. vol. 1, § 440, and note.)

Familiar examples of the admission of evidence of this character, are cases involving questions of medical practice and skill, and cases involving genuineness of handwriting. Within the same principle the question whether a vessel was unseaworthy was held admissible, because it involved the result of an examination which could not be fully communicated to a jury. (*Baird v. Daly*, 68 N. Y. 547.)

Opinion of the Court, per BROWN, J.

It was also held competent to ask a pilot "whether it would be safe for a tug boat on Chesapeake bay or any other wide water to tug three boats abreast with a high wind" (*Transportation Line v. Hope*, 95 U. S. 297); to ask of an engineer familiar with the locality and structure whether an embankment and bridges were skillfully constructed with reference to the creek (*Bellinger v. N. Y. C. R. R. Co.*, 23 N. Y. 42); and evidence of like character has been admitted on the question of negligence in mooring a vessel (*Moore v. Westervelt*, 9 Bosw. 558); on the necessity of jettison (*Price v. Harts-horn*, 44 N. Y. 94), and on questions involving nautical skill (*Walsh v. Marine Ins. Co.*, 32 N. Y. 427.) Opinions were held admissible in the cases cited, for the reason that the controlling issue in the case involved questions of skill and experience which the witness's practical knowledge enabled him to speak upon, and because the facts which impressed the mind of the witness could not be placed before the jury, and no better evidence was available.

The rule is well stated by Justice BRADLEY, in *Schwander v. Birge* (*supra*), as follows: "The governing rule deduced from the cases permitting the opinion of witnesses is, that the subject must be one of science or skill, or one of which observation and experience have given the opportunity and means of knowledge which *exists in reasons rather than descriptive facts*, and, therefore, cannot be intelligently communicated to others, not familiar with the subject, so as to possess them with a full understanding of it."

To the same effect it was said by Judge EARL, in *Ferguson v. Hubbell* (*supra*): "Opinions are allowed when the facts cannot be adequately placed before the jury so as to impress their minds, as they impress the mind of a competent skilled observer. * * * When the facts can be placed before a jury, and they are of such a nature that juries generally are just as competent to form opinions in reference to them, and draw inferences from them as witnesses, there is no occasion to resort to expert or opinion evidence."

The question which the jury in this case was to decide was

Opinion of the Court, per BROWN, J.

not one of science, and the inquiry vital to the admissibility of the evidence offered was, could the facts bearing on the question of the disappearance of the waters of the creek be placed before the jury, and were they of such a nature that the jurors could comprehend them and intelligently draw inferences from them.

There was nothing in the case as developed by the plaintiff that made opinion evidence admissible.

To sustain his theory that the subsidence of the waters in the creek was caused by the pumping from the wells, he had given evidence that the stream was made up largely of surface drainage, and not from underground currents; that it had never prior to 1883 dried up; that immediately following the commencement of the pumping from the wells the creek dried up at a point nearest the wells, while the water further up the stream and in its tributaries continued to flow.

He further showed generally the character of the surrounding soil, and that as the pumping continued and exhausted the water near the wells, the water disappeared further up the stream until its flow was substantially destroyed. The evidence of Andrews, given prior to being asked the question under consideration, added no new facts to the case. The question put to him in substance called for his opinion upon the facts proven. In other words he was asked to draw inferences and form conclusions which belonged exclusively to the province of the jury.

Whether or not the disappearance of the creek was caused by the pumping at the wells or whether the waters of the creek could filter through the ground and reach the bottom of the wells, depended upon the operation of natural laws, and if the witness had an opinion upon that subject it must have had its foundation in facts, such as the sources of the stream, the character of the soil between the bed of the creek and the bottom of the wells, the velocity of the stream and its grade, the course of the current, etc. These and any other facts bearing upon the question in issue, if deemed competent to overcome the effects of plaintiff's testimony, and account for the disap-

Opinion of the Court, per BROWN, J.

pearance of the stream, might have been shown, and it is not at all unlikely that had facts of the character referred to been proven tending to indicate other adequate causes for the disappearance of the creek, that questions would have been developed upon which the opinion of an expert witness might have been admissible. But without such proof it is not apparent from the record that the case presented any question calling for the opinion of an expert, and unless such a case was presented on the evidence the question was properly excluded. (*Gutterman v. L. N. Y. & P. Steamship Co.*, 83 N. Y. 358; *People v. Barber* 115 N. Y. 475-491.)

The form of the question in this connection must be observed. It was not an inquiry into the causes of the disappearance of the stream, and called for no fact bearing upon the question which the jury could have considered. No opinion even upon the cause of the disappearance of the water was asked, but simply whether it was *possible* for the pumps to draw the water from the creek. This admitted of a simple negative answer, which could have thrown no light on the case, and afforded no assistance to the jury in their deliberations, and might have had no foundation except deductions and inferences from the evidence already in the case.

The purpose of expert evidence is to aid the jury in their deliberation on the case and in their review of the evidence, and to be competent for that purpose it must, where the questions involved are not ones of science or art, be based upon evidence in the case and confined in cases of this character to the causes of the injury complained of.

In *Moyer v. New York Central & Hudson River Railroad Company* (98 N. Y. 645), the question held to be competent was "are there any adequate causes in your opinion for this," referring to the injury complained of. The court said, "the witness, an expert, might very well be asked, in the presence of a given effect, of what causes it either was or might be the resultant. * * * It assumed an hypothesis, the truth or falsity of which was left open to the jury, and then asked not what caused the injury, but what were all the adequate

Opinion of the Court, per

causes which might have been its or to determine among them."

Here the inquiry was of a very different nature to the jury and it indicated nothing to the jury and it indicated nothing to the jury.

Assuming a negative answer to the question whether the defendant proposed to draw the water from the pipes is impossible for our pipes to draw the water notwithstanding all that plaintiff has said, a mere naked opinion upon the precise question were to decide, it clearly was inadmissible.

None of the cases cited by the learned counsel for the defendant is in point. *Commonwealth v. Chouteau* (100 Mass. 443) was an indictment for arson, and the case goes on to say that the opinion of competent witnesses as to the value of the wood, which it was claimed connected with the crime, were parts of the same stick. This case falls within the rule stated in *Schwartz v. State* (100 Mass. 443) means of knowledge of the witness is more than descriptive facts, and the case is not in this opinion relating to questions of peculiar knowledge.

Buffum v. Harris (5 R. I. 243), was not the one under consideration, but there is nothing upon which they based their conclusion. The opinions admissible in connection with the same may be said of the case of *Detweiler v. State* (St. 377), and *Phillips v. Terry* (3 Ab. 100) cited by the respondent. *Moyer v. New York & Hudson River Railroad*, has already been cited. Between that case and the one under consideration there is no similarity.

If the question had called for a statement of any adequate cause within his knowledge of the creek, it would have been within the scope of the *Moyer Case* and been admissible. The court had before it an hypothesis or theory, the truth of which they could have considered in connection with the facts.

Dissenting opinion, per POTTER, J.

visible facts of the case, and which would have been left open for their determination.

We are of the opinion that this case was not one in which it was impossible to place the facts bearing upon the matter in controversy before the jury, and that to have admitted the opinion of the witness called for by the question asked, would have extended the rule as to expert testimony beyond that of any reported case within this state.

Whatever may be the rule elsewhere, the decisions of this state are adverse to the rule contended for by the respondent.

Our conclusion is that the ruling of the trial court was right.

There was no error in the ruling upon the other question asked of the same witness and excluded upon the plaintiff's objection.

It was of no importance what the system of pumping operated by the defendant was designed to reach, or what it depended upon. The question was, did it reach the waters of the creek and divert them from the living stream, and upon that question the evidence excluded had no bearing whatever.

The order of the General Term should be reversed and the judgment entered upon the verdict affirmed, with costs.

POTTER, J. (dissenting). I deem it proper in this case to present the grounds of my dissent from the opinion of the majority of the court. Passing the verdict found by the jury and assuming that it must be approved by this court, though it practically rests upon the theory that water of a running stream proceeding from a water-shed of uplands and brooks, and flowing along a well-defined and ancient channel, has been drawn to the points of driven wells or tubes of iron with small openings in the lower end of the same and inserted in the earth to the depth of thirty feet below and one hundred and fifty feet one side of the channel, or in other words, that water without obstruction to pursue its wonted channel to a lower level, may be diverted or drawn through solid earth twenty-five feet deep and one hundred and fifty feet wide to the vacuums in the small tubes produced by the machinery

Dissenting opinion, per

with which the tubes are connected. intending to maintain here, that this tion the omniscient (humanly speak respect to the existence and operati I assume that common or judicial not must stand silent in the sacred preser But while such may be the situation of this court over the finding of a jur duty of this court to see that the minds informed by any legitimate means be which shall irrevocably fix the right especially in a case involving the l operation in respect to waters perc application of machinery to overcome tions, and this brings me to the consi which separates me from a majority c

There is but one question to be con That question is whether a witness c by the ground of the objection, and w in question and its origin and the lands it flows and who devised and erected t with the driven wells, and has had fif sinking and operating this species of v express his opinion to an ordinary ju question whether the main body of suc drawn by means of these wells; or question which the learned trial court possible for you to take in those pipes creek?"

No one will deny that the genera can relate merely to facts, and that in to be made by the jury. (Lawson's E dence, 200.)

But this general rule has been broke sion of various classes of exceptions, re ground of necessity. (Id.) "Such nece where the facts in issue are not themse

Dissenting opinion, per POTTER, J.

dence, being either future probabilities or mere contingencies or else actual facts, but not within positive knowledge. All of these must, of necessity, be judged of only from other proved facts known generally to accompany or to indicate those in question, as for instance, where the facts to be ascertained are inferred from some rule or art or science or observed law of nature thus proved; the knowledge by which the existence of the unknown fact is inferred from the one proved, may not fall within the range of ordinary information, but may be proved by professional or experienced witnesses having peculiar skill in some art, trade, or science relating to the subject. Thus the fact of certain appearances in a dead body having been proved, the subsequent question whether such appearances indicate poison, is wholly out of the power of the best informed men to determine, unless they had made such subject a previous study. Again, the market-value of an article at a given time, upon the allowance of damages on which a jury has to pass, is frequently a question such as dealers in that article can alone decide. There it is a matter of necessity to call in the experienced or instructed opinion of such witnesses. No proof of the naked state of facts as to a ship after a storm could perhaps enable a landsman, however intelligent, to judge of those necessities which are so often to be inquired into in marine contracts. Thus, also, in an action for negligently steering a ship as in *Malton v. Nesbit*, mere proof of the naked facts could not enable a jury of landmen to draw any inference; and experienced nautical men are called in to prove whether facts of that kind amount to unjustifiable negligence. Opinion is admitted when a jury is incompetent to infer without the aid of greater skill than their own, as to the probable existence of the facts to be ascertained, or the likelihood of their occurring from the facts actually proved before them. Indeed, it would be more logically accurate to say that mere opinions even of men, professional or expert, is not admissible as such; but that facts having been proved, men skilled in such matters may be admitted to prove the existence of mere general facts or laws of nature. or the course of business as the

Dissenting opinion, per POTTER, J.

case may be, so as to enable the jury to form an inference for themselves. Thus the existence of certain appearances in the dead body having been proved, the chemist testifies that such appearances invariably or generally indicate the operation of some powerful chemical agent. His scientific opinion is, in fact, his testimony to a law of nature. All these are testimonies to general facts which the jury can ascertain in no other way, and which, when proved, afford them the means of drawing their own conclusions from the whole mass of testimony taken together. The same reason of absolute necessity has compelled the admission of evidence of opinion in certain cases where the poverty of human language makes it absolutely impossible to separate in words the minute and transient facts observed by the witnesses from the inference as to some other fact, irresistibly connected with the former in his own mind. Testimony as to handwriting, I think, resolves itself into this, as no words can freely convey to others the minute particularities on which such judgment is founded. So, too, in questions of identity as to men, to goods, horses, etc., though the facts on which judgment is founded may be partially stated, still the judgment of opinion is admitted. In these cases the witness swears as to the present conviction in his own mind as to an actual fact, though deduced from circumstances which cannot be made palpable to others. It is often difficult to draw a line of distinction between testimony to simple facts and the statement of such immediate and conclusive inferences as the witness forms in his own mind." And hence general physical facts or truths not known to the common mind and not apprehensible by the senses at single or casual observation, may be shown by one who has knowledge or skill or experience, an expert, to aid the jury in the ascertainment of the truth.

Lawson, in his work upon expert and opinion evidence, cites numerous cases which illustrate the line of distinction applicable to various subjects and situations where opinion evidence may, and where it may not be received. (1 Car. & P. 76; *Folkes v. Chadd*, 3 Dougl. 157; 1 Phillips on Ev. 778; *Goodtitle v. Braham*, 4 T. R. 498; *Price v. Powell*, 3 N.Y.

Dissenting opinion, per POTTER, J.

322; *Detweiler v. Groff*, 10 Penn. St. 377; *Buffum v. Harris*, 5 R. I. 243; *Hand v. Inhabitants of Brookline*, 126 Mass. 324.)

The cases in which it may be properly received are embraced in the language of the opinions of the different judges similar to that employed in the text of *Lawson*, *supra*.

Judge DANFORTH, in *Scattergood v. Wood* (79 N. Y. 266), states the rule as follows; "The inquiry related to a matter which was not the subject of general knowledge, but depended on facts which, from their nature, it would be difficult, if not impossible, to place before the referee, and the statement embodied in the opinion given in evidence was itself a fact derived from peculiar knowledge and skill in the use of the various machines referred to. It was the result of professional knowledge and practical experience (*Emerson v. Lowell Gas Light Co.*, 6 Allen, 146), and the question raised by the warranty could hardly be answered except by the direct opinion of those who, possessing this superior knowledge and experience, had seen the machines in operation or knew the merits of machines constructed under the plaintiff's patent, and others then in use. Upon this ground, therefore, as well as the one first stated, I think the evidence objected to was properly received." In *Smith v. Gugerty* (4 Barb. 625) the court says: "The witness was asked his opinion as an expert. The question is competent and proper when it relates to a deduction from facts concerning which the witness has a knowledge peculiar to his science, art or profession, and which is not common to the world. In such cases the jury are unable to draw a correct conclusion from the facts, and must necessarily rely upon the opinions of those who are better enabled to do so by their professional experience. * * * The requisite knowledge is confined principally, if not wholly, to the class of mechanics to which the witness belonged. That brings it within the rule." Judge ALLEN, in *Baird v. Daly* (68 N. Y. 551), says: "It was competent for the defendant, and he should have been permitted to show by the witness Hays that the scow was unseaworthy; that is, unfitted and unsafe for

Dissenting opinion, per POTTER, J.

the service in which she was engaged, and unsafe to be taken in tow. The jury were non-experts, and with every fact which would enable a skilled man to determine the question of seaworthiness, it by no means follows that they would make the proper inference and arrive at a correct conclusion."

Judge EARL said, in *Ferguson v. Hubbell* (97 N. Y. 513): "Witnesses who are skilled in any science, art, trade or occupation may not only testify to facts, but are sometimes permitted to give their opinions as experts. This is permitted because such witnesses are supposed, from their experience and study, to have peculiar knowledge upon the subject of inquiry which jurors generally have not, and are thus supposed to be more capable of drawing conclusions from facts, and to base opinions upon them, than jurors generally are presumed to be. Opinions are also allowed in some cases where, from the nature of the matter under investigation, the facts cannot be adequately placed before the jury so as to impress their minds as they impress the minds of a competent, skilled observer, and where the facts cannot be stated or described in such language as will enable persons not eye-witnesses to form an accurate judgment in regard to them, and no better evidence than such opinion is attainable." And Judge BRADLEY used language of similar import in *Schwander v. Birge*, quoted in the opinion of my brother BROWN in this case. But while the language used in the last two cases cited lays down the rule of the admissibility of opinion evidence in certain cases, they hold that the cases then under consideration did not admit of such evidence, and the reasons for so holding in those cases are, in my judgment, entirely decisive of the admissibility of the evidence excluded in this case.

In the case under consideration the device itself, the laws of nature involved in its operation and the manner of utilizing those laws in the supply of water at a particular point, is novel and unknown, if not a mystery to the common mind of the ordinary juror. Whether the water flows to the openings in the tubes solely through the law of gravity and the mobility of the water, or is drawn to those points by atmospheric pressure;

Dissenting opinion, per POTTER, J.

whether there is a power applied to produce a vacuum and to obtain the pressure of the atmosphere, how such power, if employed, is applied, and the measure and limits of such power, and the regulation of the machinery or means of exerting and applying such power; or if some other power than this is employed to transfer the water from the stream into the tubes, what such other power is, and how it is applied to the works, and whatever the power may be that is employed for the purpose, what its strength and efficiency are, and whether sufficient to draw water the distance and through and along the strata of subterranean soils that exist in this case. All these, and doubtless many other conditions are involved in the practical working of driven wells, and the proper solution of the question to be determined by the jury in this case. These principles and conditions are only known to, or can be appreciated or applied by men of science and experience. They were not proved in this case, and if an attempt had been made to prove them by witnesses, it would have been quite impossible to have communicated to the jury, or for the jury to have rightly apprehended and to have properly applied them to the question upon trial.

This case, it seems to me, very plainly belongs to that class which is described in the language of Judges EARL and BRADLEY above quoted as allowing, if not requiring, opinion evidence, and not to that class of cases in which those learned judges held this species of evidence not to be admissible. Those cases were *Ferguson v. Hubbell* and *Schwander v. Birge* (*supra*). The former of these cases was an action to recover the damages which plaintiff has sustained in consequence of the negligence of the defendant in setting fire to his fallow, and thus burning plaintiff's house and barn.

After testimony had been given by various witnesses in relation to the condition of the land, the state of the weather, and of the wind and various other circumstances surrounding the fire, the defendant in his own behalf testified that he was a farmer and had himself, and had seen others clear land, was asked, "What do you say as to whether or not as to that

Dissenting opinion, per POTTER, J.

time the fires were set there at that place, it was a proper time in your judgment for burning log heaps on a fallow that had been burned over?" The question was objected to and the objection was overruled and the answer received. The General Term affirmed the ruling but the Court of Appeals reversed the same. Judge EARL wrote the opinion and in the opinion used the hereinbefore quoted language indicating in what class of cases opinion evidence is proper, and distinguishing the case then under consideration from that class by the use of the following language: "Where the facts can be placed before a jury, and they are of such a nature that jurors generally are just as competent to form opinions in reference to them and draw inferences from them as witnesses, then there is no occasion to resort to expert or opinion evidence. To require the exclusion of such evidence, it is not needed that the jurors should be able to see the facts as they appear to eye witnesses or to be as capable to draw conclusions from them as some witnesses might be, but it is sufficient that the facts can be presented in such a manner that jurors of ordinary intelligence and experience in the affairs of life can appreciate them, can base intelligent judgments upon them and comprehend them sufficiently for the ordinary administration of justice."

Judge EARL also refers to similar cases, *Fraser v. Tupper* (29 Vt. 409) and *Higgins v. Dewey* (107 Mass. 494), decided in the same way and upon same grounds.

The case *Schwander v. Birge* (46 Hun, 67) was an action to recover the loss sustained by the plaintiff for the negligence of the defendant in so constructing his building or factory, that the plaintiff's intestate, who was an employee of the defendant, could not escape from the fire which consumed the building. The plaintiff's intestate was upon the fifth floor of the building when the fire was discovered in the lower part of the building. The length, height and structure, including hallways, doors of egress to the roof and adjoining buildings, etc., etc., were proven.

After this evidence, a witness in behalf of defendant was

Dissenting opinion, per POTTER, J.

asked this question : " Was that, in your judgment, a proper and sufficient mode of access and egress from the building under any circumstances that might occur ?" The question was allowed and answered over an exception and the plaintiff had a recovery. The General Term reversed the judgment, holding that the question was improper. Judge BRADLEY, writing the opinion at General Term, held that the case did not fall within the class admitting opinion evidence in the language hereinbefore quoted, for the reasons stated in the following language : " And it is difficult to see that it came within the rule permitting the opinions of experts. This building was 161 feet in length and forty-seven feet in width, and the evidence tends to show that the room occupied the entire space on that floor between the outer walls. The location of the stairs and door, the distance from them to remote parts of the room could be stated and complete description of the room given so as to convey to the jury an intelligent understanding of the situation. And when that can be done the rule requires that the testimony of witnesses shall be confined to a statement of the facts, and that the conclusions or opinions of witnesses be not permitted as evidence."

I have thus far considered the main, if not the only question in this case. There is no occasion to consider any other, for it is conceded, in the opinion of the majority of my brethren, that the witness was an expert and was conceded by the ground of the objection to his evidence to be an expert. (*Schwander v. Birge*, 46 Hun, 68; *Stevens v. Brennan*, 79 N. Y. 255.) Nor that the question proposed to the witness was or was quite near to the question to be decided by the jury. (*Curtis v. Gokey*, 68 N. Y. 426; *Transportation Line v. Hope*, 95 U. S. 297), and other cases cited in opinion of Brother Brown in this case.

Some criticism is made in that opinion in relation to the form and point of the question asked, " whether it was possible for the pumps to draw the water from the creek ?" and that a negative answer to it would not have explained the disappearance of the stream. While that is quite true, I do not perceive

Statement of case.

that the defendant was bound to account for its disappearance any further than to show that it was not caused by the driven wells. That was the charge plaintiff made and his sole grievance against the defendant, and that was all that devolved upon the defendant to deny or disprove. The defendant was not bound to account for all natural or unnatural phenomena in relation to the water of this creek, under a penalty of \$6,000 and costs of suit for its failure to do so.

I think the order or judgment of the General Term should be affirmed with costs.

All concur with BROWN, J., except FOLLETT, Ch. J., POTTER and HAIGHT, JJ., dissenting.

Order reversed and judgment affirmed.

THE CORN EXCHANGE BANK, Appellant, v. THE FARMERS' NATIONAL BANK OF LANCASTER, PENNSYLVANIA, Respondent.

118	443
148	128

M. drew a check on defendant, a Pennsylvania bank, with which she had an account, payable to the order of C., and mailed it to him at Indianapolis; C. indorsed it in blank and delivered it to the H. bank for collection. The H. bank indorsed the check "for collection" and forwarded it to plaintiff, its correspondent bank in New York, "for credit;" it was received and credited to the H. bank in general account, plaintiff reserving the right to charge it back if dishonored. It did not appear that plaintiff knew or suspected that the H. bank was acting simply as a collecting agent. Plaintiff indorsed the check the day it was received "for collection and remittance," mailed it to defendant, with directions to remit by draft payable in New York city. Defendant received the check the next day, charged it to M.'s account and cancelled it, and on the same day mailed to plaintiff its draft payable to plaintiff's order on a bank in New York city for the amount, less a charge made against plaintiff for the services. The H. bank having failed, M., the drawer of the check, and C., the payee, after the check had been so paid and cancelled and the draft mailed to plaintiff, but before it was presented for payment, requested defendant to stop payment, which it did, and the draft on presentation was dishonored. In an action upon the draft, *held* (BRADLEY and BROWN, JJ., dissenting), that plaintiff was entitled to recover; that the check of M. having been charged to the account of the drawer and cancelled, and a draft therefor delivered to plaintiff, defendant had

Statement of case.

legally discharged its duty to the drawer and was released from liability thereon; that it could not thereafter assert, as against plaintiff, who was its principal, the legal rights or equities of a third person; that neither plaintiff nor defendant was an agent for C.; and conceding the latter could maintain an action against plaintiff to recover the amount of the check, as to which, *quære*, this was not available to defendant as a defense, as no contract relation existed between it and C., nor was there any privity between them.

(Argued October 30, 1889; decided February 25, 1890.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made December 31, 1886, which affirmed a judgment in favor of defendants entered on a decision of the court on trial without a jury.

This action was brought upon a draft drawn by defendant, payable to plaintiff's order, payment of which was refused by the bank.

The material facts are stated in the opinion.

John M. Bowers for appellant. The defendant cannot set up the claim of a third party, where it is not affected by such claim. (*City Bank v. Perkins*, 29 N. Y. 554; *McKay v. Draper*, 27 id. 256; *Aubery v. Fiske*, 36 id. 47; *Hayes v. Southgate*, 10 Hun, 511; 74 N. Y. 486; *Freeman v. Falconer*, 12 J. & S. 132; *Whiting v. City Bank*, 77 N. Y. 363; *McGiffin v. Baird*, 62 id. 329; *O'Brien v. Jones*, 91 id. 193; *Brown v. Thayer*, 12 Gray, 1; *Gray v. Johnson*, L. R. [3 H. L.] 1; *Case v. Hall*, 24 Wend. 102; *King v. Oser*, 4 Duer, 431; *Rogers v. Crandall*, 26 Hun, 388.) The plaintiff, having made advances in good faith on the credit of the check for which the draft in suit was issued, without notice of any defect in the title, can assert its claim to the same against the original owner. (*C. I. Works v. A. E. N. Bank*, 34 Hun, 26; *McBride v. F. Bank*, 26 N. Y. 450; *Commercial Bank v. Marine Bank*, 1 Trans. App. 302; *S. L. & S. F. R. Co. v. Johnston*, 27 Fed. Rep. 243; *Cragie v. Hadley*, 99 N. Y. 131; *A. C. Bank v. Hughes*, 17 Wend. 94; *M. N. Bank v. Lloyd*, 90 N. Y. 530.)

Opinion of the Court, per Fo

Jefferson Clark, for respondent.

out contradiction that Cameron never
the check, but delivered it to the Har
The Harrisons having indorsed it to p
lection, plaintiff held it only as agent f
no other interest in it. (*Potter v. Me.*
641; *Van Amee v. Bank of Troy*, 81
Wasson, 47 N. Y. 439.) The fact th
check, instead of having been paid
money, took the form of a draft paya
cannot, upon principle or authority, ma
the right to those proceeds. (*Sickles v.*
Barker v. Prentice, 6 Mass. 430; *Con*
600; *M. Nat. Bank v. Lloyd*, 90 N.
plaintiff does not stand in the position
of the check in question. (*N. P. Ba*
114 N. Y. 28.) Defendant, by receiv
check and returning it to the drawer, h
owner of the check in the amount nam
M. & M. Bank, 78 N. Y. 272, 273.)

FOLLETT, Ch. J. In July, 1884, Mar
Lancaster, Pa., where the Farmers' N
caster, was located, with which she kep
1884, she drew a check on this bank fo
John J. Cameron, or order, and mailed
apolis, Ind., who, July 15, 1884, inde
delivered it to a firm of private bank
Indianapolis, under the name of "H
check, though indorsed in blank, was
received for the purpose of collecti
Exchange Bank was the New York
Harrisons' Bank, and they exchanged
mutual accounts, Harrisons' Bank being
sight bills or checks against its balance wi
Bank. The view we take of this case m
further consider the manner in which th

Opinion of the Court, per FOLLETT, Ch. J.

viously been kept. July 15, 1884, Harrisons' Bank indorsed the check to the Corn Exchange Bank for collection and credit, and forwarded it by mail. It was received July seventeenth, and credited by the Corn Exchange Bank to Harrisons' Bank; reserving, however, the right to charge it to Harrisons' Bank if it should be dishonored. It was not found by the court, nor was it asserted that the Corn Exchange Bank knew, or had the slightest reason to suspect, that Harrisons' Bank did not own the check, and was acting only as a collecting agent for Cameron, or some undisclosed owner, and so the Corn Exchange Bank became the holder of the check in good faith, and could, had it been dishonored, have maintained an action thereon for its collection. July seventeenth, the Corn Exchange Bank indorsed the check "for collection and remittance" to the Farmers' National Bank of Lancaster, the drawee, with directions to remit by draft payable in the city of New York. July eighteenth, the check was received by the Farmers' National Bank of Lancaster, was charged to the account of the drawer, Mary C. Melson, and cancelled. For this service the Farmers' National Bank of Lancaster charged the Corn Exchange Bank \$1.84, and on the same day drew its check or sight draft, payable to the Corn Exchange Bank, or order, on the First National Bank of New York, for \$1,870, and mailed it to the Corn Exchange Bank. The check was no longer a valid contract. The liability of the drawer and indorsers thereon was ended, and could never be restored. The Lancaster Bank had legally, and in good faith, discharged its duty to the drawer, the indorsers and the holder of the check, and the Corn Exchange Bank had accepted of the draft of the Lancaster bank in discharge of the liability of the drawer and indorsers. The Lancaster bank accepted of the agency tendered by the Corn Exchange Bank, performed the services and received payment therefor. The relation of principal and agent was established, and in discharge of its liability thus assumed the Lancaster bank mailed the draft. July 17, 1884, Harrisons' Bank failed, and on the eighteenth, but after the check had been paid and cancelled and the draft given in pay-

Opinion of the Court, per FOLLETT, Ch. J.

ment mailed, the drawer of the check, Mary C. Melson, and the payee, John J. Cameron, requested the Lancaster bank to stop payment of its draft, which it did, and the draft was dishonored. The Corn Exchange Bank brings this action to recover the amount of the draft, which the Lancaster bank defends on the ground that the plaintiff did not hold the check for value, and is not entitled to its proceeds as against John J. Cameron, the payee. The defense is not placed on the ground that it is necessary to protect the defendant from any present or future liability, for it is conceded that it has exactly performed all of its duties in respect to the check. It does not deny that it became the agent, for a consideration, of the Corn Exchange Bank, and promised by its draft to pay the plaintiff \$1,870.

By the law of this state Harrison's Bank was the agent for Cameron, but neither the plaintiff nor defendant was his agent, and had either neglected to take the necessary steps to collect the check, to Cameron's injury, he would have had no right of action against either; but would have had a cause of action against Harrison's Bank. (*Allen v. Merchants' Bank*, 22 Wend. 215; *Montgomery County Bank v. Albany City Bank*, 7 N. Y. 459; *Commercial Bank of Penn. v. Union Bank*, 11 id. 203; *Ayrault v. Pacific Bank*, 47 id. 570; *Exchange Nat. Bank of Pittsburgh v. Third National Bank*, 112 U. S. 276; *Morse on Banks*, [3d ed.] § 272.) In *Montgomery Co. Bank v. Albany City Bank*, the plaintiff indorsed and sent a draft to the Albany City Bank for collection, which, in turn, indorsed and sent it to the Bank of the State of New York for collection; but the latter bank negligently omitted to present the draft for payment, and the drawer and indorsers were discharged. The plaintiff sued both banks and recovered against both at Circuit, and the judgment was affirmed by the General Term; but it was reversed in the Court of Appeals as to the Bank of the State of New York, and affirmed as to the Albany City Bank. It was said: "The New York State Bank was the agent directly guilty of the neglect. That bank was employed to do the service by the plaintiff's agent, the Albany City Bank, as its agent, to which it was alone responsible for its

Opinion of the Court, per FOLLETT, Ch. J.

acts and neglect, and for which the latter, according to the settled rule, was alone responsible to the plaintiff, there being no agreement to the contrary, expressed or implied."

It is unnecessary to specially consider the cases which were decided in this state prior to *Allen v. Merchants' Bank*, *supra*, or those of states in which it is held that the bank receiving payment of the paper is the agent of the owner, notwithstanding it may have passed through several banks before reaching the bank making the collection.

The ground upon which the defendant seeks to justify the refusal to perform its contract with its principal seems to be that if the plaintiff receives the money, it ought to pay it to John J. Cameron, but may not, and, therefore, this defense.

Assuming, but not deciding, that Cameron could maintain an action against the Corn Exchange Bank to recover the amount of the check, such fact would in no wise support this defendant's contention. No contract relation exists between it and Cameron, nor is there any privity between them.

When the owner of commercial paper delivers it for collection to bank A, which forwards it for collection to bank B, which, in turn, forwards it for collection to bank C, to which it is paid, it has been held that if bank C, instead of paying the money to bank B, retains and applies it on a debt due from bank B, the owner (bank A being insolvent) may recover of bank C; but we are unable to see that these cases justify this defendant in resisting the payment of its draft, to which it has no defense, for the benefit of a third person, who may have a right to recover the money represented by it.

The check which the defendant received from the plaintiff having been paid, charged to the account of the drawee and surrendered, the account closed, and a draft therefor delivered to the Corn Exchange Bank, the defendant can not now assert as against its principal the legal rights or equities of a third person. (*McKay v. Draper*, 27 N. Y. 256; *Aubery v. Fiske*, 36 id. 47; Wharton on Agency, § 242 and cases there cited.)

The judgment should be reversed and a new trial granted, with costs to abide the event.

Dissenting opinion, per BRADLEY, J.

BRADLEY, J. (dissenting). I am unable to concur with the majority of the court in the result or reasons given for it.

The check drawn by Mrs. Melson on the defendant was indorsed in blank by Cameron, the payee, and left with the Harrisons, the Indianapolis bankers, for collection. They indorsed it to the plaintiff's cashier for collection, and sent the check to the plaintiff, their correspondent in the city of New York, and the latter in like manner indorsed it to the cashier of the defendant, and sent the check to him with directions to remit to the plaintiff its proceeds in New York city funds. This was received by the defendant on July eighteenth, and on the same day it drew its draft on the First National Bank of New York for the amount, less exchange, and mailed it to the plaintiff. The Harrisons failed and suspended payment on July seventeenth, and immediately after hearing of such failure, and on July nineteenth, Cameron requested the defendant not to pay it, and afterward, before the defendant's draft was presented, requested the defendant to stop its payment, and thereupon, on the last named day, the defendant notified the bank on which its draft was drawn not to pay the draft, and asked the plaintiff to hold it. It was, however, afterward presented to the drawee, and payment being refused, the draft was protested for non-payment. This action was brought on that draft, and the question is whether the facts so stated constitute a defense. They clearly would not if the plaintiff had taken the apparent and actual title to the check and become a holder of it in good faith for value, because the indorsement in blank by the payee apparently operated as a transfer of the check to the Harrisons. But the plaintiff parted with nothing on the faith of the check. While the letter in which it was received by the plaintiff, stated that it was inclosed for credit, the indorsement made upon the check by the Harrisons was restrictive and purported that it was sent to the plaintiff for collection. And it appears that this portion of the letter preceded the statement of the remittance and was printed and was the ordinary form of the letters of the Harrisons in which all their transmissions of paper to the plaintiff were made. That

Dissenting opinion, per BRADLEY, J.

fact may, in view of the manner that the indorsement was made, deny to that formal portion of the letter the significance which it might otherwise have had. But it has no essential importance upon the question here, inasmuch as the plaintiff advanced nothing upon the check. The plaintiff had for many years had an account current with the Harrisons arising from remittances of paper from each to the other for collection and credit of the proceeds, and the latter from time to time drew drafts upon the former. When the check was received by the plaintiff, the amount of it was credited to the Harrisons in such account, and, after the protest of the draft, was charged back to them in accordance with the course of dealing, as understood between those parties, that if paper received and credited was not paid it should be placed to the debit of the party sending it.

The check having been placed in Harrisons' hands for collection, the plaintiff, by crediting them with it in general account, acquired no title to it as against Cameron, the payee. His was the right to reclaim the check, or to obtain its proceeds if paid, or to stop its payment by the defendant to any party other than a holder in good faith for value, which position the plaintiff did not have. (*Dickerson v. Wason*, 47 N. Y. 439; *Warner v. Lee*, 6 id. 144; *Commercial Bank v. Marine Bank*, 1 Abb. Ct. App. Dec. 405; *Farmers' M. N. Bank v. King*, 57 Penn. St. 202.) The question now arises whether the situation in which the defendant was placed or its relation assumed to the plaintiff, was such as to deny to it the right to make the defense which it sought to make in this action. Treating the defendant as a mere volunteer in the denial of its liability upon the draft, it clearly could not defeat a recovery. It could not in such case question the title of the plaintiff. That was the principle of the case of *City Bank of New Haven v. Perkins* (29 N. Y. 554); *McKay v. Draper* (27 id. 256); *Aubrey v. Fiske* (36 id. 47); *Hays v. Hathorn* (74 id. 486), cited by the defendant's counsel, and the same may be said of the other cases cited by him on the question of the right of the defendant to defend the action. The disability

Dissenting opinion, per BRADLEY, J.

may arise out of the relation which one party assumes to another, whom he represents, and between whom in some sense that of principal and agent exists, and the latter may not be liable to third persons, but to his principal only, while the relation exists; nor can the party who undertakes to perform a duty assumed to another, when called upon for performance set up by way of relief from liability to do so, the right in a third party with whom he is not connected and with whom he has personally no concern upon the subject (*Montgomery Co. Bank v. Albany City Bank*, 7 N. Y. 459); but that is not this case. The payee of the check never parted with the title to it. The Harrisons were employed by him to collect it, and the plaintiff was employed by them to aid in the accomplishment of the purpose for which it was left with them by the payee. The latter had a right to step in and intercept the check in the hands of any party other than a holder in good faith for value and reclaim it as his property, and in like manner to interrupt the transmission of the proceeds of it to the Harrisons and recover them. This right of the owner is within the doctrine of the *Commercial Bank* and *Dickerson* cases before cited. And the cause for its attempted exercise was the insolvency of the Harrisons. The check had then been charged by the defendant to the drawer, and the draft as directed by the plaintiff had been mailed to it by the defendant. The latter had discharged its duty to both the drawer and the plaintiff, and nothing remained for it to do toward the accomplishment of the purpose for which the check was drawn and transmitted through the plaintiff to the defendant. The fund was represented by the draft, which the defendant had mailed to the plaintiff. The draft was the means by which the proceeds of the check were sent on their way to the destination contemplated when the check was left with the Indianapolis bankers, and they belonged to Cameron, its payee. He as such owner having the right to step in and control their destination and thus countermand the authority which he had given to the Harrisons to receive the proceeds of the check, with that view requested the defendant to act for him and stay the funds from the

Dissenting opinion, per BRADLEY, J.

hands of the plaintiff by stopping the payment of the draft so forwarded to it. This was done, and in doing so the defendant represented him. The facts justifying his right to do so supported the action of the defendant, and afforded to it a defense in the plaintiff's action upon the draft, unless the defendant by its relation to the plaintiff was disabled from acting upon the request and direction of the owner of the fund. The situation presented by the facts, was, that the Harrisons were the agents of the payee of the check and the plaintiff was their agent to aid in its collection, and by the latter the defendant was called upon for its payment. The direction of Cameron to stop the payment to the plaintiff, operated as a revocation of the agency he had set in motion and to stay, at the then stage of their progress, the means which had been adopted for its execution. It was unimportant for that purpose and such effect that the defendant had issued and forwarded its draft. The direction which he had the right to give and the defendant, in view of the facts, had the right to observe, was that the latter should not pay his money to the plaintiff, who as against Cameron and his direction had no right to it. And thus was afforded to the defendant a defense founded upon the right of Cameron and his authority or requirement. The question would have been no different if the defendant's messenger had been on his way with the funds to the plaintiff, and his mission had been countermanded before handing over the money to the latter. The draft sent was a mere transmission in that form of the apparent liability of the defendant to pay, upon which the plaintiff probably may have realized but for the interruption caused by the direction given to the drawee of the draft not to pay it. It follows that the defendant was justified in asserting that the plaintiff had no right to the fund represented by the draft, as effectually as Cameron could have done if he had been interpleaded as a party defendant. (*Comstock v. Hoag*, 5 Wend. 600; *Herrick v. Carman*, 10 Johns. 224; *Barker v. Prentiss*, 6 Mass. 430.) And in view of the facts found by the trial court, and as before stated, it is unnecessary to further consider the state of account

Dissenting opinion, per BRADLEY, J.

between the plaintiff and the Harrisons, as it is quite unimportant on which side of it the balance was, since the credit of the check to the latter was on general account, and no advance was made to them on account of the check. (*McBride v. Farmers' Bank*, 26 N. Y. 450; *Lindauer v. Fourth Nat. Bank*, 55 Barb. 75; *Dod v. Fourth Nat. Bank*, 59 id. 265.) In *Montgomery County Bank v. Albany City Bank*, the question was as to whom the correspondent of another, who had received commercial paper for collection and sent it to him for a like purpose, was liable for failure or neglect to perform the duty assumed to charge the indorsers. It involved no consideration having relation to the fund when collected, and is not in conflict with the later cases to the effect that the beneficial owner of the proceeds of the paper when collected may effectually assert his right to the fund as against any party receiving it in the execution of the agency. It is said in the prevailing opinion in the present case, that if the check had been dishonored the Corn Exchange Bank could have maintained an action upon it. Assuming that, if not interrupted by the payee, it may have been so, it is wholly without importance upon any question in this case. But against whom could this action be supported? Certainly not against the defendant without its acceptance of the check. (*Attorney-General v. Continental L. Ins. Co.*, 71 N. Y. 325.) Nor against Cameron, the payee and indorser, because he was the beneficial owner of it. Nor against Harrisons, the plaintiff's principal. And a further reason why plaintiff could have maintained no action in its own name upon the check is that it took no apparent title. The purpose of the indorsement by the Harrisons, as expressed in it, was that it was made to the plaintiff for collection of the check. This restriction denied to the plaintiff the apparent title, and it had none in fact, to support any action in its name upon the check. (*Daniels on Neg. Inst.*, §§ 698, 699; *White v. Nat. Bank*, 102 U. S. 658; *Sigourney v. Lloyd*, 8 Barn. & C. 622; *Hook v. Pratt*, 78 N. Y. 371.) The purpose of the suggestion that the defendant charged the plaintiff \$1.84 for the draft is not apparent.

Statement of case.

If, however, it was made to show a consideration between the parties for the draft issued by the defendant, it may be added that this amount retained by the defendant was taken from the proceeds of the check for exchange, which was legitimately within the expense of collection of the check in the usual course for that purpose, and the amount of the draft was so much less than that of the check. It seems to be without significance for any purpose in this action.

I think the judgment should be affirmed.

All concur with FOLLETT, Ch. J., except BRADLEY and BROWN, JJ., dissenting, and HAIGHT, J., not sitting.

Judgment reversed.

JULIA FREAR, Appellant, v. FRANKLIN SWEET et al., Respondent.

While parties to an action have a right to limit the issues to be tried to those made by the pleadings, they are not bound so to do, but may by mutual consent try any other issues.

An appellate court in reviewing such a case is only called upon to determine whether the parties have consented to try the substituted issues, and if so whether the decisions of the trial court upon those issues are according to law.

In the absence of amended pleadings or of a written stipulation the appellate court may infer the consent to try such substituted issues from evidence offered upon the one side and the absence of objections, or the character of the objections upon the other.

By virtue of a mutual agreement between A., B., and C., and as parts of the same transaction, A. conveyed to B. certain lands, the latter giving back a mortgage to secure part of the purchase-price. B. conveyed a portion of the land to C. with covenant of quiet enjoyment, who paid the purchase-price in cash. This was included in and was part of the cash payment made to A., and he executed a release of that portion from the mortgage. C. immediately went into possession of the portion deeded to him, built a residence thereon, and thereafter occupied it, but did not record his deed or the release until after the mortgage and several assignments thereof were recorded, but before the recording of the assignment to plaintiff. In an action to foreclose the mortgage, *held* (FOLLETT, Ch. J., and VANN, J. dissenting), that C's portion was sold free from the mortgage before its execution and was never in reality included therein or subjected to the lien thereof; and that, therefore, the record-

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Statement of case.

ing acts did not create a lien and were in nowise involved; also that because of the covenant in the deed from B. to C., the former, so far as related to the portion conveyed had an interest to protect by way of defense to the mortgage, and such defense was available both to him and his grantee; and that the several assignees of the mortgage took it subject to the equities between the original parties, and so, subject to this defense.

Also, *held*, that, although C's deed was not recorded until after the recording of the assignments, his possession and occupancy was notice of his rights to the assignees.

After a witness had detailed, without objection, the facts as to the agreement and the transaction between the parties, he was asked as to whether the execution and delivery of the deed from A. to B., of the bond and mortgage from B. to A., of the deed from B. to C., the payment of the consideration by C. and its payment to A. as part of the cash payment made by B., and the execution and delivery of the release by A. to C. were not simultaneous acts "made at the same time and place and one and the same transaction;" this was objected to as calling for a conclusion of law and improper; the objection was overruled. *Held*, no error justifying a reversal, as it had already been proved, without objection, that the various acts referred to were done at the same time and place.

(Argued December 13, 1889; decided February 25, 1890.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made December 14, 1886, which affirmed a judgment in favor of defendants, entered upon a decision of the court on trial at Special Term.

This action was brought to foreclose a mortgage executed by defendant, Franklin Sweet, to Francis Creed, bearing date May 1, 1873, to secure the payment of \$2,000, in five years thereafter, said sum being a part of the sum of \$2,500, the purchase-price of a farm or a lot of land at that time conveyed by said Creed to said Sweet.

The mortgage was duly recorded in the proper office on the seventh day of May following, and was assigned to and became the property of the plaintiff through several mesne assignments, on the 9th of April, 1881; his assignment was recorded in the proper office on the 5th day of May, 1886. The inter-

Statement of case.

mediate assignments were duly recorded directly after they were respectively executed. At the time of the giving of the deed and mortgage between Creed and Franklin Sweet, the latter executed a deed of five acres of the land described in the deed and mortgage to the defendant, Clement Sweet, and said Creed released the same from the lien of said mortgage; the said Clement at the same time paying therefor \$150, the entire price, which was included in and went to make up a part of the \$500 paid to Creed towards the purchase-price of the land described in the deed and mortgage. The defendant Clement Sweet, immediately after such purchase of the five acres, built a house thereon and occupied the same with his family until the trial of this action.

The deed of the five acres and the release were not recorded till June 24, 1882, which was subsequent to the time of recording the several assignments of the mortgage, save the assignment to the plaintiff. The assignors of the mortgage to the plaintiff purchased and paid for it the amount owing thereon, without any notice of the release, and in entire good faith, believing that the lien of the mortgage covered all the lands described in it, including the five acres in controversy.

The complaint, after setting forth the matters above stated (except those in relation to the release), asked for a decree of foreclosure and sale of the premises described in the mortgage, including the five acres owned by the defendant, Clement Sweet. His answer alleged that the mortgagor, Creed, had released the five acres from the lien of the mortgage before he assigned it, and asked to have the same excepted from the judgment of sale.

The trial court decided that the five acres were not subject to the mortgage, and directed a sale of the remainder of the mortgaged premises only. The plaintiff appealed to the General Term from that portion of the judgment which excepts out of the premises to be sold, the five acres referred to.

Further facts appear in the opinion.

W. Farring for appellant. The release was invalid. (1 R.

Opinion of the Court, per POTTER, J.

S. 738, § 137; *M. L. Ins. Co. v. Wilcox*, 55 How. Pr. 43; *St. John v. Spaulding*, 1 T. & C. 483; *Gentner v. Morrison*, 31 Barb. 155; *Chamberlain v. Sprague*, 86 N. Y. 603.) The instrument did not take effect as a release against subsequent purchasers and incumbrances. (*Chamberlain v. Sprague*, 86 N. Y. 603.) But aside from other considerations the release was of no force against this mortgage because of the recording act. *M. L. Ins. Co. v. Wilcox*, 55 How. Pr. 43; *St. John v. Spaulding*, 1 T. & C. 483; 1 R. S. 762, § 37; *Westbrook v. Gleason*, 79 N. Y. 215; *Decker v. Boice*, 83 id. 215; *Smith v. K. L. Ins. Co.*, 84 id. 589; *Bacon v. Van Schoonhoven*, 87 id. 446; *Viele v. Judson*, 82 id. 32; *Trustees, etc., v. Wheder*, 61 id. 88; *Green v. Warwick*, 64 id. 220; *Crane v. Turner*, 67 id. 437; *Westbrook v. Gleason*, 79 id. 23; *Smyth v. K. L. Ins. Co.*, 84 id. 389. It was not necessary that plaintiff's assignment should be recorded, or that she should take the mortgage without notice, in order that she should be protected from the release. (*Page v. Warring*, 76 N. Y. 463; *Wood v. Chapin*, 13 id. 509.) The rule of constructive notice by possession does not apply to the assignee of a prior mortgage, because the natural inference in such a case is, that the occupant is holding subject to the mortgage. (*M. L. Ins. Co. v. Wilcox*, 55 How. Pr. 43.) The defense in the answer rests entirely on the release, and the defendant cannot now set up an entirely different defense. (*Smyth v. K. L. Ins. Co.*, 84 N. Y. 589.)

Esselstyn & McCarty for respondents. The original mortgagee never had a right to foreclose this mortgage as to the five acres; and no assignee from or through her could acquire any greater right than she had. (*Westbrook v. Gleason*, 79 N. Y. 23; 61 id. 88; 64 id. 220; 67 id. 437.)

POTTER, J. From the matters alleged in the pleadings, an appellate court would expect that the issue tried would have been, whether the five-acre piece of the lands had been released from or was still subject to, the lien of the mortgage

Opinion of the Court, per POTTER, J.

and that the findings of the trial court would have indicated a decision of that question. But it will be observed upon reference to the findings in this case, that the trial court did not decide the issue made by the pleadings, but decided quite another and different issue, and that is, that the five-acre piece was not and never was subject to the lien of the mortgage. While parties have the right to try the issues made by the pleadings, yet they are not bound to, but may try any other issue by mutual consent. The pleadings in such cases serve to show what was once in the minds of the pleaders and what the parties had the right to try, if so disposed, and perhaps the further purpose of constituting a part of the judgment-roll, as the Code of Practice requires that the judgment-roll should contain the pleadings. The court, in reviewing such cases, is only called upon to determine whether the parties have consented to try the substituted issues and whether the decisions of the court upon the new issue are according to law.

In the absence of amended pleading or of stipulation, the court of review must infer the consent to try issues from the evidence offered upon the one side and the absence of objections or the character of the objections, if any are made, upon the other side. (*Marston v. Gould*, 69 N. Y. 220; *Platner v. Platner*, 78 N. Y. 95; *Walsh v. Wash. Ins. Co.*, 32 N. Y. 440-443.)

Upon the trial of this case, the plaintiff proved the substantial allegations of the complaint, by the introduction of the mortgage, the several assignments and the dates of recording the same. Such proofs showed that the five-acre piece was subject to the lien of the mortgage. The defendant Clement Sweet then introduced the deed of the five acres to himself by Franklin Sweet, the mortgagor, and the release thereof by Franklin Creed, the mortgagee, and that these several instruments were the results of a common negotiation between the parties to the instruments, which when enlarged and expressed in their constituent elements signify that on the 1st day of May, 1873, Francis Creed, Franklin Sweet and

Opinion of the Court, per POTTER, J.

Clement Sweet met together and entered into a tri-partite negotiation, the said Creed to sell his land, and the said Sweets each to buy a portion of it. At the same time and place Franklin Sweet gave a mortgage back to said Creed, purporting to impose the lien of said mortgage upon said five acres; that said five acres were at the same time and place conveyed to Clement Sweet by Franklin Sweet, and at the same time and place said Francis Creed released said five acres from any lien under said mortgage, and that at the same time and place the defendant Clement Sweet, paid \$150, the price of the five-acre lot, which went to make up the \$500 received by Francis Creed, and that sum with the \$2,000 secured to be paid by the mortgage, made up the price of the entire piece of land.

All this evidence was received without objection except that the evidence of the delivery of the release was objected to as immaterial and that the release was not then attested and acknowledged. This objection to the delivery of the release was doubtless properly overruled. These facts were proved without objection.

The next step in the trial was this question by defendant: "Q. Were not the execution and delivery of the deed from Francis Creed to Franklin Sweet and of the bond and mortgage from Franklin Sweet to Francis Creed; the payment of your \$150 to Franklin, and his \$350 with yours, making \$500, to Francis Creed; the execution and delivery of the deed of the five acres to you, and the execution and delivery of the release thereof to you, simultaneous acts made at the same time and place, and one and the same transaction?"

This was objected to as calling for a conclusion of fact, and improper, and the objection was overruled and defendant excepted. Thus it will be seen that all this evidence, when given in detail, was not objected to, and when it was afterward sought to embrace all this evidence in one question, that question was not objected to as calling for impertinent or irrelevant evidence, or evidence not within the issue, but simply as calling for a conclusion of fact, and improper. It

Opinion of the Court, per POTTER, J.

seems to me to be a very plain case where the parties have ignored the issue made by the pleadings, and by mutual consent tried another. (See authorities before cited.)

Nor do I perceive that any error was committed by overruling the objections and allowing the witness to answer the general questions referred to above. The witness had already testified to every fact contained in the general question, and without objection. Adding to the end of the general question embracing the entire series of acts, if they constituted "one and the same transaction," it seems to me was unobjectionable and could work no harm. (*Sweet v. Tuttle*, 14 N. Y. 465-472; *Knapp v. Smith*, 27 id. 277-282.) Every one of the matters constituting the series had been before proven to have been done at the same time and place without objection. Whether they constituted one and the same transaction was much more a conclusion of law than of fact, and were all before the trial court when this general question was asked, and could not in the least degree have affected the decision that was subsequently made by the court.

Upon the matters thus proven practically without objection, the trial court found as a conclusion of fact that, "First. That on the 1st day of May, 1873, the defendant Franklin Sweet made, executed and delivered to one Francis Creed his bond and mortgage as alleged in the complaint, and purporting to cover the premises described in the complaint in this action, but not intended to cover the five acres sold to Clement Sweet by Franklin Sweet, and bounded generally as follows: North by Henry Wilbur, east by Franklin Sweet, south by the highway, and west by Otis Moore, which mortgage was duly recorded in the Dutchess county clerk's office on the 7th day of May, 1873, in Liber 144 of Mortgages, at page 447, etc. This piece was never included in the plaintiff's mortgage, but was sold free from it before it was executed."

And, as a conclusion of law, "First. That the five acres of land claimed by the defendant Clement Sweet in this action, and included in the description in said mortgage, is free from said foreclosure." "Second. That the whole of the premises

Opinion of the Court, per POTTER, J.

described in the mortgage, except the five acres sold to Clement Sweet, be adjudged to be sold according to the rules and practice of this court in foreclosure cases."

These results are claimed to have been produced, notwithstanding the five acres are embraced within the description contained in both the deed and the mortgage mentioned, from the fact found that at the time of the execution of the mortgage Franklin Sweet, the mortgagor, did not own the five-acre lot, but the same was owned by the defendant Clement Sweet, who had purchased the same in legal effect from the owner thereof, Francis Creed, and paid him therefor, and that the deed from him to Franklin Sweet did not convey the five acres to the latter, but to him as conduit to Clement Sweet, and that the deed from Franklin to Clement Sweet was but the mode of accomplishing a sale of the five-acre lot by Francis Creed to defendant Clement Sweet. I think the evidence received upon the trial would warrant the inference of fact drawn by the trial court, and, hence, this court cannot interfere with the inference drawn, and it follows as a matter of law that the five acres in dispute was never subject to the lien of the mortgage, and that the same and the rights of the parties in respect to the mortgage are in nowise affected by the recording acts, for if the mortgage was not a lien upon the five acres, of course the recording acts could not operate to create a lien or a right where none existed before.

Treating, as we must for the purpose of this review, the deeds, mortgage and release as simultaneously made and delivered and as constituent parts of the same transaction, the five acres conveyed to Clement Sweet were not in reality as between the parties embraced within the mortgage to Creed. And the fact that the deed of the five acres contained a covenant of warranty of quiet enjoyment gave to the grantor an interest to protect by way of defense against the mortgage so far as related to the land so conveyed by her deed. And such defense was available both to him and his grantee against Creed, the mortgagee.

The several assignees, including the plaintiff, must be deemed

Dissenting opinion, per VANN, J.

to have taken the assignment of the mortgage subject to this right of defense. And the rule is too well settled to require amplification of the reasons upon which such rule is founded, that an assignee of a mortgage takes it subject to the equities between the original parties to it. The assignee steps into the place, in that respect, of the mortgagee. (*Bush v. Lathrop*, 22 N. Y. 535; *Davis v. Bechstein*, 69 id. 440; *Bennett v. Bates*, 94 id. 354.) And in the view taken, the recording act has no application to protect the assignee against the defense founded upon such equity. (*Schafer v. Reilly*, 50 N. Y. 61.)

Although the deed to Clement Sweet was not recorded until long after it was made, the notice which possession would afford of his rights was furnished by the fact that he went into actual possession of and occupied the five acres from the time he took the conveyance.

The judgment should be affirmed.

VANN, J. (dissenting.) Assuming that the release, as between the parties thereto, took effect immediately, the same as if it had been duly acknowledged, the question remains whether a release of part of mortgaged premises is subject to the recording act.

In *Decker v. Boice* (83 N. Y. 215), it was held that while an assignee in good faith, and for a valuable consideration, of a recorded mortgage, gets no preference over a prior unrecorded deed or mortgage by reason of such record, when his assignor could not claim it on account of notice or any other equity, still as such assignee is a purchaser and his assignment is a conveyance under the recording act, if the assignment is recorded before the recording of such prior deed or mortgage, he thereby obtains a preference and an unrecorded conveyance is as to him void under said act.

The court, speaking through ANDREWS, J., said: "The remark has been made in some recent cases, following *dicta* in earlier cases, that the only purpose of the statute authorizing the recording of assignments of mortgages was to regulate the relation to each other of successive assignees of the mortgagee

Dissenting opinion, per VANN, J.

of the same mortgage, but in none of them was this remark essential to the decision. * * * It is doubtless true that it was one object of the provision * * * to protect a subsequent assignee * * * of the same mortgage from being defrauded through a prior assignment not before required to be recorded, and of which he might have no notice. But this was not its only purpose. The assignee in good faith and for value of a mortgage, by recording his assignment, may gain priority over a prior unrecorded mortgage, although it could not be claimed by his assignor." See, also, *Smyth v. Knickerbocker L. Ins. Co.* (84 N. Y. 589).

If, therefore, the release came within the provisions of the recording act, the plaintiff was protected against it, because it was not placed upon record until after two successive assignments of the mortgage had been recorded. She was a purchaser in good faith and for full value without notice of the release, and acquired all the rights and title of her assignors and of their assignor.

The recording act requires all conveyances to be recorded and renders void all that are not recorded, as against subsequent purchasers in good faith and for a valuable consideration. (4 R. S. [8th ed.] 2469, § 1.) A "purchaser," as defined by a subsequent section, includes, among others, every assignee of a mortgage. (Id., § 37.)

It follows, therefore, that the plaintiff can successfully invoke the statute, provided said release is a conveyance within the meaning thereof. The same act further provides that the term "conveyance," as used therein, shall be construed to embrace every instrument in writing by which any estate, or interest in real estate, is created, aliened, mortgaged or assigned, or by which the title to any real estate may be affected in law or equity, with certain exceptions that do not apply to this case. (4 R. S. 2475, § 38.) It has been held under this section that a release of part of mortgaged premises is a conveyance by which the title to real estate may be affected, and that, unless recorded, it is void as against a subsequent assignee of the mortgage for value and in good faith whose assignment

Dissenting opinion, per VANN, J.

has been recorded. (*St. John v. Spalding*, 1 T. & C. 483; *Mutual L. Ins. Co. v. Wilcox*, 55 How. Pr. 43.)

I think that a release is within the spirit, if not the letter, of the comprehensive definition of a conveyance quoted from the statute. It is an instrument in writing by which the title to real estate may be affected in law or equity, because it may prevent the transfer of the title under a foreclosure. It is in the nature of a satisfaction of the mortgage, so far as the premises released are concerned, and it has been held that a satisfaction-piece comes within the statutory definition. (*Bacon v. Van Schoonhoven*, 87 N. Y. 446.) The court in deciding that 'case said that a satisfaction-piece "is equivalent to a release of the mortgaged premises. Instruments creating liens by way of mortgage, being expressly declared to be embraced, for the purposes of this act, in the term 'conveyance,' it is difficult to conceive any reason why instruments discharging such liens should not be included in the general definition."

While a release of the entire premises would utterly destroy the lien, a partial release destroys it *pro tanto*. If that which creates a lien may affect the title to real estate, that which extinguishes a lien may have a like result in that respect. The creation of a lien cannot affect title unless its destruction may also. If building up may have a certain effect, tearing down may also have an effect, by preventing that which might otherwise have taken place. Moreover, the release under consideration is in the form of a conveyance and has a granting clause, by which the party of the first part, for a consideration named, declares that he has "granted, released, quit-claimed and set over and by these presents doth grant, release, quit-claim and set over to the party of the second part, his heirs and assigns," the premises in question.

The learned trial court, however, decided the case upon the theory that the mortgage never attached to the five acres, because the deed of the entire tract, the mortgage back thereon, the deed of the five acres and the release thereof were all executed at the same time, were parts of the same transaction and

Dissenting opinion, per VANN, J.

all of the parties understood that the part released was thereby exempted from the lien of the mortgage.

The complaint alleges the execution and delivery of the bond and mortgage and of the several assignments thereof and the recording of the same as stated. The premises, as described both in the complaint and the mortgage by metes and bounds, include the five acres. It is further alleged in the complaint, that "the mortgage was given for part of the purchase-money of the premises above described," referring to the entire tract. Clement Sweet and wife are the only defendants who served an answer. Without denying any of the allegations of the complaint, they allege that on May 1, 1873, Franklin Sweet and wife conveyed the five acres to said Clement Sweet, and that Francis Creed duly released the same from the lien of said mortgage. The defendants, therefore, stand upon the record as admitting, beyond the power of contradiction, that the mortgage was given to secure part of the purchase-price of the entire premises, and no amount of evidence, whether received with or without objection, would justify a finding to the contrary. Notwithstanding this the trial court found that the mortgage was not intended to cover the five acres and that they were never included in the plaintiff's mortgage, but were sold free from it before it was executed. Exceptions were duly taken to these findings, which are without any available evidence to support them, because, if for no other reason, the defendants had in their answer admitted that they were not true and they were hence estopped from asserting the contrary on the trial.

Besides, the very release read in evidence by them recites that the mortgage covered the lands purporting to be released. Its language is: "Whereas * * * by an indenture of mortgage * * * to secure the payment of the money therein specified," the mortgagor "did convey certain lands and tenements of which the lands hereinafter described are part, unto said mortgagee; and, whereas," the mortgagee "has agreed to give up and surrender the lands hereinafter described unto the party of the second part, his heirs and assigns, and to

Dissenting opinion, per VANN, J.

hold and retain the residue of said mortgaged lands as security for the money remaining unpaid on said mortgage," etc. This was followed by a description of the lands released.

Thus, the defendants admit, both by their answer and their evidence, that the mortgage covered the five acres, and there is no evidence that is claimed to show the contrary, except the several instruments already mentioned, and the fact that they were all executed simultaneously.

The form of the transaction, moreover, shows that the parties did not intend the result found by the trial court, as otherwise no release would have been necessary. Until the delivery of the deed of the entire tract, Franklin Sweet had no title to the five acres that he could convey to Clement Sweet, and as soon as that delivery was made the mortgage, covering in terms the five acres, and given for the purchase-price thereof, attached as a lien. The conveyance of the 113 acres and the mortgage back thereon, must have preceded the deed of the five acres.

There is, therefore, no evidence tending to sustain the findings referred to, even if the defendants were not concluded by their answer.

I cannot find, in the record before us, sufficient evidence of acquiescence by the plaintiff in the trial of an issue outside of the pleadings to conclude her or to affect her rights in any way. She simply read in evidence the bond and mortgage, and the several assignments thereof, proved when and where each was recorded, and rested. The defendants read in evidence, without objection, the deed from Franklin Sweet to Clement Sweet. When they offered the release in evidence, it was objected to "as immaterial, and that execution and delivery thereof were not proven until June 8, 1882."

Clement Sweet was then sworn as a witness, and testified that he owned "the five acres in dispute and covered by the mortgage;" that he was present when the deed of the whole farm was given by Creed to Franklin Sweet, who paid \$2,500 therefor, \$500 in cash, and the balance by bond and mortgage; that he, the witness, paid \$150 for the five acres, being part of

Dissenting opinion, per VANN, J.

the \$500 paid down on the farm. He was then asked if the release was delivered to him at that time, and the plaintiff objected to the question as immaterial, and because the release was not then attested or acknowledged. The objection was overruled, and the witness answered: "Yes, sir; deed of five acres also, and at same time I saw deed delivered to Franklin Sweet and bond and mortgage given to Creed. Have been in possession ever since." He was then asked if the execution and delivery of all these papers were simultaneous acts, made at the same time and place, and as parts of one and the same transaction. This was objected to by the plaintiff as calling for a conclusion of fact, and improper, but the objection was overruled and the witness answered: "Yes." The defendants then rested, and no further evidence was given by either party, except that certain assignees of the mortgage testified as to what they paid for it, and that they never heard of the release until this action was commenced. The deed to Franklin Sweet was not offered in evidence. As the plaintiff objected to substantially all of the evidence tending to show that the deeds, bond, mortgage and release were executed at the same time and as parts of the same transaction, I am unable to see how she can justly be held to have impliedly assented to the trial of a new issue, not formed by the pleadings. The only issue, according to the pleadings, was whether the five acres were duly released from the lien of the mortgage, which it was admitted covered them. The issue, which it is now claimed was tried without objection, was whether, owing to a tri-partite agreement, the mortgage ever attached to the five acres. The statement of what occurred upon the trial shows that the plaintiff attempted to protect herself, by timely objections, from the trial of any question outside of the pleadings. The evidence now relied upon to support facts found, but not alleged, and the exact opposite of which was expressly admitted by the pleadings, was received notwithstanding the plaintiff's objections thereto. The judgment appealed from rests upon facts diametrically opposed to the express admissions of both parties in their pleadings.

Statement of case.

I am unable to concur in the conclusion that such a judgment should be affirmed, and accordingly vote for a reversal and a new trial.

All concur with POTTER, J., except FOLLETT, Ch. J., and VANW, J., dissenting.

Judgment affirmed.

THE NATIONAL CITY BANK OF BROOKLYN, Respondent, v.
ROBERT E. WESTCOTT, as President, etc., Appellant.

A check drawn upon plaintiff by one of its depositors, was altered by raising the amount and changing the name of the payee; it was delivered to the N. Y. & B. D. E. Co., an express company, for collection, indorsed in blank with the name of the fictitious payee. The express company transmitted and indorsed the check for collection to defendant's company, the W. E. Co. That company presented the same for payment and received the amount called for by it as raised, which it delivered to the N. Y. & B. D. E. Co., and that company delivered it to the person from whom it had received the check. Thereafter the fraud was discovered and the amount overpaid demanded back. *Held*, that an action to recover the same was not maintainable; that plaintiff was advised by the indorsement that defendant's company was simply acting as agent, and it having in good faith, before notice of the fraud, paid over the money to the company from whom it received the check, was thereby discharged from liability.

The complaint, after averments as to the fraudulent alteration of the check, alleged that the "check so altered, changed and raised, and properly indorsed, was presented" by the agent of the W. E. Co. The answer admitted that the check "properly indorsed" was presented for payment as alleged in the complaint. *Held*, that this was not an admission that the check was indorsed by the W. E. Co.

The agent who presented the check for payment indorsed his name simply upon it without adding the word agent. *Held*, that in the absence of proof of express authority in such agent to indorse, the W. E. Co. was not chargeable as indorser; that as it appeared by the restrictive indorsement upon the check that defendant had taken no title and was simply acting as agent, there was no implied authority in its agent to do anything beyond what was requisite to the performance of the agency, and this imposed upon defendant neither the duty to indorse nor to guarantee the check.

(Argued January 13, 1890; decided February 25, 1890.)

Statement of case.

APPEAL from a judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made February 15, 1887, which affirmed a judgment in favor of plaintiff entered upon a verdict.

This action was brought to recover the sum of \$654, being the amount of an alleged overpayment upon a check drawn on the plaintiff by one of its depositors, which was fraudulently raised.

On November 19, 1884, the New York and Boston Despatch Express Company handed to the Wescott Express Company, of which company defendant is president, for collection, a check purporting to have been drawn by H. Von Deilen, on the plaintiff, of which the following is a copy:

“BROOKLYN, *Nov.* 15, 1884.

“National City Bank of Brooklyn:

“Pay to Samuel T. Allen or order six hundred and sixty dollars.

“\$660.

H. VON DEILEN.

“Indorsed, SAMUEL T. ALLEN.

“For collection, New York and Boston Despatch Express Company, A. J. Dunlap, Agent.”

On the same day George W. Dixon, who was the agent of the defendant company, indorsed his name upon the check, presented it to the plaintiff and received the amount of it. And thereupon the money was delivered to the N. Y. & Boston Despatch Express Co., which received it, and on November twenty-seventh, at Philadelphia, paid the money to the party from whom it had received the check. In February following, the plaintiff ascertained that the check so presented was not genuine, but that Von Deilen, the drawer, had, on November thirteenth, given to a stranger a check drawn upon the plaintiff for six dollars, payable to Mrs. J. W. Smith or order, and that it had been so feloniously altered as to produce the check first above set forth. As soon as the discovery was made the plaintiff demanded of the defendant repayment of the amount so paid, which was refused.

Statement of case.

Chas. A. Da Costa for appellant. The court will not hold that a fact is admitted by the pleadings if it was not clearly and concisely alleged in the complaint, and was evidently not intended to be admitted in the answer. (*Clark v. Dillon*, 97 N. Y. 370, 373; *Bates v. Rosekrans*, 23 How. Pr. 98.) The indorsement "for collection" and the surrounding circumstances show conclusively that the plaintiff knew that the defendant was simply acting as agent, and as the defendant had delivered the fund to its principal before notice, it is no longer responsible for the amount collected. (*Sweeny v. Easter*, 1 Wall. 166; *Bank v. F. Nat. B'k*, 19 Fed. Rep. 301, 302; *Dickerson v. Wason*, 47 N. Y. 439; *White v. Nat. Bank*, 102 U. S. 658; *Cecil Bank v. Bank of Maryland*, 22 Md. 148; *Norwalk Bank v. A. E. Co.*, 4 Blatch. 455, 460; *N. P. Bank v. S. Bank*, 114 N. Y. 28, 33; *La Farge v. Kneeland*, 7 Cow. 460; *Mowatt v. McLelan*, 1 Wend. 173; *Herrick v. Gallagher*, 60 Barb. 566; Story on Agency, § 300.) The defendant company cannot be held as indorser. (*Briggs v. Partridge*, 64 N. Y. 357, 363; *Barker v. M. Ins. Co.*, 3 Wend. 94; *Pentz v. Stanton*, 10 id. 271; *De Witt v. Walton*, 9 N. Y. 571; *Stackpole v. Arnold*, 11 Mass. 27; *E. R. R. Co. v. Benedict*, 5 Gray, 566; *Beckham v. Drake*, 9 M. & W. 79; *Mills v. Hunt*, 20 Wend. 431, 433, 434; *N. C. N. Bank v. Rust*, 97 N. Y. 635, 636.)

Edgar Bergen for respondent. To review facts there must be an appeal from an order refusing a new trial. (*Matthews v. Myberg*, 63 N. Y. 656.) Both sides having requested the court to direct a verdict, and the court having directed a verdict for the plaintiff, the defendant cannot now claim that the case should have been given to the jury on the facts. (*Provost v. McEncroe*, 102 N. Y. 650.) Mere delay in detecting a forgery will not prevent a recovery by a person who gives notice of the forgery as soon as discovered. (*Frank v. Lanier*, 91 N. Y. 112, 116.) Notwithstanding the restricted indorsement "for collection," the defendant had a perfect right to pay the check to the prior indorser, or to indorse it absolutely, as was

Statement of case.

the indorsement in this case. (*Holmes v. Hooper*, 1 Bay. 160; *Daniel on Neg. Inst.*, § 698; *Cromwell v. Hewitt*, 40 N. Y. 491.) The complaint alleges, and the answer admits that the defendant properly indorsed and presented said check by George W. Dixon, its agent. The defendant having requested the court to direct a verdict, and the court having found that the defendant indorsed the check, cannot now dispute the finding of the court as to that fact. (*Provost v. McEncroe*, 102 N. Y. 650; *F. Nat. Bank v. Hall*, 44 N. Y. 395, 397; *Bank of Genesee v. Patchin Bank*, 19 id. 312; *Bank of New York v. Bank of Ohio*, 29 id. 619.) The defendant having indorsed the check absolutely, guaranteed to the plaintiff the check in every particular, and is liable in this action. (*Daniels on Neg. Inst.*, 497, § 669; *Littaur v. Goldman*, 72 N. Y. 506, 515, 517; *White v. C. N. Bank*, 64 id. 316-320; *Turnbull v. Bowyer*, 40 id. 456; *Colson v. Arnot*, 57 id. 253-258; *S. Bank v. Loomis*, 85 id. 207; *C. E. Bank v. Nassau Bank*, 91 id. 74; *Morford v. Davis*, 28 id. 481; *Edwards v. Dick*, 4 B. & Ald. 212; *Erwin v. Downs*, 15 N. Y. 575; *Clews v. Bank*, 89 id. 421.) The defendant claims that to hold it as the indorser of the check, it was necessary to demand payment of the check and protest it for non-payment. As this point was not raised on the trial, it cannot be raised here. (*Thayer v. Marsh*, 75 N. Y. 340; *Varian v. Johnston*, 108 id. 645, 647.) It is not necessary to make a technical protest to charge an indorser. (*Coddington v. Davis*, 1 N. Y. 186, 190; *S. N. Bk. v. Bank*, 3 Wkly. Dig. 583; *T. C. Bk. v. Grant*, H. & D. Supl. 119; *W. R. Bk. v. Taylor*, 34 N. Y. 128; *Cuyler v. Stevens*, 4 Wend. 566; *Woodin v. Foster*, 16 Barb. 146; *Cole v. Jessup*, 10 N. Y. 96; *Thayer v. Marsh*, 75 id. 340; *People ex rel. v. McLean*, 80 id. 254, 260, 261; *Wellington v. Morey*, 90 id. 656; *Cromwell v. Hewitt*, 40 id. 491; *Turnbull v. Bowyer*, Id. 456, 461; *Goddard v. M. Bk.*, 4 id. 147.) The doctrine of principal and agent has no application whatever to this case, because the defendant did not assume to act as an agent, but acted as a principal. (*Freund v. I. & T. Bk.*,

Statement of case.

76 N. Y. 352; *Mills v. Hunt*, 20 Wend. 431, 433, 434; 2 Parsons on Bills, 21; *Fassin v. Hubbard*, 55 N. Y. 465, 470; *H. C. Nat. Bk. v. Rust*, 97 id. 635, 636; *Holt v. Ross*, 54 id. 472, 475.) But even if the defendant be regarded as an agent, it was merely the sub-agent of the forger who raised the check, and the instrument by means of which the forger was enabled to commit a fraud on the plaintiff. (*Gutchess v. Whiting*, 46 Barb. 139, 142; *Cullen v. Thompson*, 4 McQ. 424, 433; Bouvier's L. Dict., tit. Agent, 87; *Snowden v. Davis*, 1 Taunt. 358; *Hoffman v. Carow*, 22 Wend. 225; *Clews v. Bank*, 89 N. Y. 418, 427; *Indig v. N. C. Bk.*, 80 id. 100, 106; *Sprights v. Hawley*, 39 id. 441.) Since the signature of the maker of the check was genuine, and the plaintiff paid the defendant \$660, or \$654 more than it was entitled to receive, under a mistaken impression that the whole check was genuine, the plaintiff was entitled to the verdict as directed by the court. (*White v. C. N. Bank*, 64 N. Y. 316, 320; 65 id. 659; *Bank of Commerce v. Union Bank*, 3 id. 230; 64 id. 319; *M. Bank v. N. C. Bank*, 59 id. 67; *S. N. Bank v. N. Bank*, 3 Wkly. Dig. 583; *S. Bank v. N. Bank*, 67 N. Y. 458.) The fact that the plaintiff paid the check after it had been raised, will not prevent its recovery in this action. (*M. N. Bank v. N. C. Bank*, 59 N. Y. 77; *S. Bank v. N. Bank*, 67 id. 462; *Clews v. N. Y. B. Assn.*, 89 id. 418, 421; *S. Bank v. Loomis*, 85 id. 207, 213; *S. N. Bank v. N. Bank*, 3 Wkly. Dig. 583; *White v. C. N. Bank*, 64 N. Y. 320, 321.) Where money has been paid by mistake by several indorsers, the remedy of each is by an action over against his respective indorser. (*White v. C. N. Bank*, 64 N. Y. 322; *C. Bank v. Bank*, 1 Hill, 287, 294; *Robson v. Eaton*, 1 T. R. 62; *Clews v. Bank*, 89 N. Y. 426, 427.) Even though the conditions of the parties have changed, by reason of the payment of the moneys over to the forger, there is no injustice in holding the defendant liable to the plaintiff. (*Thayer v. Marsh*, 75 N. Y. 340; *C. Bank v. M. Bank*, 3 Keyes, 337.)

Opinion of the Court, per BRADLEY, J.

BRADLEY, J. The case, as represented by the evidence, was at the trial treated by the counsel for the parties as presenting a question of law only. The request for direction of a verdict for the defendant was refused, and the court directed a verdict for the plaintiff, and exceptions were taken. So that if, in any view which may be taken of it, the evidence is sufficient to support the verdict, the recovery must be sustained. (*Dillon v. Cockcroft*, 90 N. Y. 649.)

In the presentation of the check to the plaintiff for payment, and in paying it, the parties acted in good faith and upon the assumption that it was in all respects genuine. The drawer of it was one of the plaintiff's depositors, and had been such for considerable time. The signature to the check was his, signed to one drawn by him, and which had been raised in amount from six to six hundred and sixty dollars, and the name of another payee inserted in it. This fraudulent alteration was not discovered until nearly three months after the time the payment was made. In the meantime the money had been paid over to the person who had placed it with the N. Y. & B. D. Express Co. for collection.

The payment was made by the plaintiff upon a mistake of fact as to the character of the check; and money paid under such circumstances may be recovered back from the party to whom payment is made. If the Wescott Express Company had been or had assumed to be the apparent owner of the check when it was presented to and paid by the plaintiff, the defendant would have been liable to reimburse the plaintiff. (*Canal Bank v. Bank of Albany*, 1 Hill, 287; *Bank of Commerce v. Union Bank*, 3 N. Y. 230; *Corn Exchange Bank v. Nassau Bank*, 91 id. 74.) But in the present case the check was in fact sent to the defendant company for collection, of which the plaintiff was advised by the indorsement upon it to that effect made by the N. Y. & B. D. Express Co. The defendant, therefore, apparently and in fact represented that company, and in the relation of such agency received the money from the plaintiff. (*Montgomery Co. Bank v. Albany City Bank*, 7 N. Y. 459.) And prior to the time of the dis-

Opinion of the Court, per BRADLEY, J.

covery of the fraudulent character of the check, having handed the money over to the company from which it was so received for collection, the defendant was not liable to the plaintiff as for money paid by mistake. (*National Park Bank v. Seaboard Bank*, 114 N. Y. 28.) It is, however, contended that the defendant was indorser of the check, and became chargeable as such. And to establish the fact that the defendant did indorse it, reference is made to the pleadings. The complaint alleged that the "check so altered, changed and raised and properly indorsed was presented on or about the 19th day of November, 1884, by George W. Dixon, as agent of said Wescott Express Company." And the defendant, by the answer, "admits the allegations that the check referred to in said complaint, properly indorsed, was presented to said plaintiff for payment on or about the 19th day of November, 1884, by George W. Dixon, as agent of the said Wescott Express Company." This admission, in its import, is no broader than those allegations of the complaint, and they do not charge that the company indorsed the check, and they are entitled to such construction only, in favor of the plaintiff, as the language used fairly requires. (*Slocum v. Clark*, 2 Hill, 475; *Clark v. Dillon*, 97 N. Y. 370.) That the check, properly indorsed, was presented to the plaintiff by Dixon, as the agent of the defendant company, does not necessarily furnish the inference of indorsement by the company.

But it is urged that inasmuch as Dixon was the agent of the company, and presented the check as such for payment, his indorsement must or may be that of his principal.

He indorsed his name upon it without anything to indicate that he made it other than individually. It may be that if he had added the word agent to his name, it may have been properly shown to have been done by him as such agent, and the indorsement treated as that of his company upon evidence being given of his authority to make it. (*Hicks v. Hinde*, 9 Barb. 528; *Babcock v. Beman*, 11 N. Y. 200; *Bank of Genesee v. Patchin Bank*, 19 id. 312.)

Nothing appears in any manner upon the paper character-

Opinion of the Court, per BRADLEY, J.

izing the indorsement of Dixon as made in a representative capacity or his purpose to so make it, and it would be unduly extending the rule to charge another party in such case as indorser of commercial paper. (*Mills v. Hunt*, 20 Wend. 431; *Booth v. Bierce*, 40 Barb. 114, 136; *Briggs v. Partridge*, 64 N. Y. 363.) This view has relation only to the situation produced by the act of making such an indorsement, and without any reference to the effect of an adoption of the act by the principal as against the latter.

The indorsement by the New York and Boston Despatch Express Co. appearing by its terms to have been made for the purpose of the collection of the check, the defendant assumed the relation of agency in receiving it and obtaining the money and transmitting it to such indorser.

The restrictive indorsement denied to the defendant the apparent title, and rendered the check non-negotiable, of which the plaintiff was advised by the restriction appearing by the terms of the indorsement. The defendant company took no title to it, and could transfer none. The right of the defendant as the correspondent or agent of the other company, was to present the check to the plaintiff and receive the money. This was the import of the indorsement of that company. (*Sigourney v. Lloyd*, 8 Barn. & C. 622; *Hook v. Pratt*, 78 N. Y. 371; *White v. National Bank*, 102 U. S. 658.) There was, therefore, no implied authority in Dixon as the agent of the defendant company, to represent it in the transaction beyond what was requisite to the performance of the agency assumed by it, or was legitimately within its purpose. This imposed upon the defendant neither the duty to indorse the check or to guarantee its genuineness. Nor does it appear that Dixon as such agent had any special authority to do either, or any authority in that respect other than such as arose from his relation of agency. A different case would have been presented if the defendant company, through its agent, had received the money in its own right, or apparently so, from the plaintiff. Then with or without indorsement, the defendant may have been treated as warranting the genuine-

Statement of case.

ness of the check and as liable to the latter for the amount. (*White v. Continental Nat. Bank*, 64 N. Y. 316, 320; *Susquehanna Valley Bank v. Loomis*, 85 N. Y. 207, 211.)

The cases cited by the plaintiff's counsel, and upon which he relies to support in this respect the recovery, were those in which the implication was permitted that the party presenting paper and receiving payment was the lawful holder having title. The doctrine of guaranty and liability in such case is firmly settled, but for the reasons before suggested it is not applicable to the present case.

No other question seems to require consideration.

The judgment should be reversed and a new trial granted, costs to abide the event.

All concur.

Judgment reversed.

ROBERT C. MARTIN, Appellant, v. MARIA ANN RECTOR,
Respondent.

An indenture executed in 1808 which contained a grant of land, reserving a perpetual annual rent, after a covenant on the part of the grantees to pay the rent reserved and various other covenants on their part, contained a condition that if the rent should be unpaid for twenty-eight days after the day of payment specified, it should be lawful for the grantor, his heirs and assigns to enter and distrain, etc.; then followed this condition: "Should it at any time happen that no sufficient distress can be found upon the premises to satisfy such rent due and in arrear as aforesaid, or if either of the covenants and conditions hereinbefore contained * * * shall not be performed * * * or shall be broken * * * it shall be lawful for the grantor, his heirs and assigns to re-enter." In an action under the Code of Civil Procedure (§ 1504) to recover the premises on the ground that six months or more rent was in arrear, *held*, that the right to re-enter for non-payment of rent was not limited to the case of default of sufficient distress; but that the general condition authorizing a re-entry in case of a breach of either of the covenants applied to the covenant to pay rent; and that, therefore, to maintain the action it was not necessary to show that before its commencement the fifteen days' notice in lieu of a distress for rent required by the provision (§ 1505) before the bringing of an

Statement of case.

action of ejectment, where a right of re-entry is reserved in default of a sufficient distress, was given.

Martin v. Rector (48 Hun, 371), reversed.

(Argued January 14, 1890; decided February 25, 1890.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made February, 1887, which affirmed a judgment in favor of defendant entered upon the report of a referee.

This is an action of ejectment for non-payment of rent.

By a sealed indenture dated June 14, 1808, Stephen Van Rensselaer granted, sold and released to George Adriance and Rachel Witbeck, their heirs and assigns, the premises first described in the complaint, with certain exceptions and reservations, to have and to hold the same "unto the said parties of the second part * * * their heirs and assigns for ever; yielding and paying therefor * * * during the continuance of this grant, * * * the yearly rent of twelve bushels of good, clean, merchantable winter wheat and four fat hens * * * and to perform one day's service with carriage and horses, the first payment to be made the first day of January next, and the payments thereafter in and upon the said first day of January in each year." There was a covenant on the part of the grantees, their heirs and assigns to "pay or cause to be paid unto the said Stephen Van Rensselaer, his heirs and assigns, the yearly rent reserved at the days and times and manner aforesaid," as well as to pay all taxes that should at any time be assessed upon the premises. The instrument also contained certain conditions as to the sale of the premises by the grantees, including the payment of a bonus to said grantor equal to the amount of one year's rent, and a provision that the title should revert to him, if said conditions were not complied with. There were numerous provisos for the benefit of the grantor, and among them, that if the rent reserved should be unpaid for twenty-eight days after the day of payment specified, it should be lawful for him, his heirs or assigns, at his or their option "either to prosecute for the recovery of all rents then due in some court

Statement of case.

of record, or * * * to enter and there to distrain, and the distress so taken to lead, drive and carry away," and by a sale of the same to collect the rent and costs. Immediately after this provision is the following, which is the final clause: "And provided further, and these presents and everything herein contained are upon this express condition, that if it should at any time happen that no sufficient distress can be found upon the premises to satisfy such rent due and in arrear as aforesaid, or if either of the covenants and conditions hereinbefore contained on the part of the said parties of the second part, their heirs or assigns, to be performed, fulfilled and kept, shall not be performed, fulfilled and kept, or shall be broken, that then and in each and every such case, from thenceforth and at all times thereafter, it shall and may be lawful for the said Stephen Van Rensselaer, his heirs and assigns, or any of them, into the whole of the said hereby granted premises * * * to re-enter the same as his and their former estate to have again and enjoy, and the said parties of the second part, their heirs and assigns and all others, thereout and from thence utterly to expel, put out and amove and that upon such entry made * * * these presents * * * shall cease, determine, and become void and of no effect."

The complaint set forth the substance of said indenture, alleged that the plaintiff had duly succeeded to all the rights of said grantor, that no part of the rent accruing January 1, 1884, had been paid, that it was more than six months in arrear and demanded judgment for recovery of possession. There was a second count for other premises, covered by another instrument of like character.

Upon the trial, after these instruments had been read in evidence, and certain testimony had been given tending to sustain the causes of action set forth in the complaint, it was admitted that no notice had been served pursuant to section 1505 of the Code of Civil Procedure, whereupon the complaint was dismissed, upon defendant's motion, on account of the failure to serve such notice.

Opinion of the Court, per VANN, J.

G. L. Stedman for appellant. The court erred in holding that the fifteen days' notice required by the Code should have been served before the commencement of this action. (Code Civ. Pro. § 1505; Laws of 1846, chap. 274, § 3; *Cruger v. McLaurry*, 41 N. Y. 219, 222; *Hosford v. Ballard*, 39 id. 147.) This action was properly brought without notice. (Code Civ. Pro. § 1504; *Van Rensselaer v. Jewett*, 2 N. Y. 146.)

Geo. W. Miller for respondent. The action of ejectment for non-payment of rent is regulated by statute. (Code Civ. Pro. chap. 14, art. 1.) Service of notice of intention to re-enter is an indispensable prerequisite to the maintainance of the action. (Code Civ. Pro. § 1505; *Van Rensselaer v. Ball*, 19 N. Y. 100; *Van Rensselaer v. Slingerland*, 26 id. 580; *Van Rensselaer v. Snyder*, 13 id. 299; *Whyland v. Weaver*, 67 Barb. 116.)

VANN, J. The determination of this appeal depends upon the construction to be given to the instrument, of which an analysis appears in the foregoing statement, in connection with certain sections of the Code appertaining to the subject. It is well settled that the parties to such a grant are presumed to have contracted with reference to the power of the Legislature to annul, modify or change the remedies therein provided for the collection of the rent reserved. (*Van Rensselaer v. Snyder*, 13 N. Y. 299; *Van Rensselaer v. Slingerland*, 26 N. Y. 580, 585.)

From an early day there has been legislation upon the subject, in the interest of both grantor and grantee, abolishing old and substituting new remedies, so as to conform to changes in times. Such legislation, when subjected to review by the courts, has uniformly been pronounced constitutional, even as to pre-existing instruments, because it affected the remedy only. (*Van Rensselaer v. Ball*, 19 N. Y. 100.)

Where the right to re-enter for a breach of the covenant to pay rent was reserved, unless the lease prescribed the method of making a demand for the rent, it was necessary for the

Opinion of the Court, per VANN, J.

landlord to proceed according to the common law, and either in person or by his duly authorized agent to make an actual demand of the exact amount of rent due on the very day that it became due, at a convenient time before sunset, so that the money could be counted before night and at the precise place where the rent was made payable, or if that was not provided for in the grant or lease, at the most notorious place upon the land demised. (*Van Rensselaer v. Jewett*, 2 N. Y. 141, and cases cited on p. 148.) To relieve the landlord of this technical and inconvenient method of procedure, it was provided by a statute, passed before either of the leases under consideration was executed, that an action of ejectment should "stand instead of a demand of the rent in arrear." (L. 1805, chap. 95.) This statute appears in the Revised Laws (1 R. L. chap. 63, p. 440, § 23), was re-enacted in the Revised Statutes (2 R. S. 505, § 30), and is the basis of section 1504 of the Code of Civil Procedure, which is as follows: "When six months' rent or more is in arrear upon a grant reserving rent, or upon a lease of real property, and the grantor or lessor, or his heir, devisee or assignee, has a subsisting right by law to re-enter for the failure to pay the rent, he may maintain an action to recover the property granted or demised, without any demand of the rent in arrear or re-entry on the property."

The plaintiff claims that this section applies to this case and that it should control the decision of this appeal.

When the right to distrain for non-payment of rent was abolished, it was provided by the same act that where a right of re-entry was reserved in the grant or lease in default of goods whereon to distrain, ejectment might be maintained, provided a written notice of intention to re-enter was given fifteen days before the commencement of the action. (L. 1846, chap. 274, § 3.)

This provision was substantially reproduced by section 1505 of the Code, of which the following only is here material: "Where a right of re-entry is reserved and given to a grantor or lessor of real property in default of a sufficiency of goods and chattels whereon to distrain for the satisfaction of rent

Opinion of the Court, per VANN, J.

due, the re-entry may be made, or an action to recover the property demised or granted may be maintained by the grantor or lessor, or his heir, devisee or assignee, at any time after default in the payment of rent, provided the plaintiff, at least fifteen days before the action is commenced, serves upon the defendant a written notice of intention to re-enter."

The defendant contends that this section controls, and that service of the notice required thereby is essential to the maintenance of the action. The former section applies only when six months' rent or more is in arrear, independent of the service of notice, and the latter, when the required notice has been served, regardless of how much, or how long, rent has been due. By neither is the remedy therein provided made exclusive, and a case might arise where both sections would apply.

As the right to re-enter in default of sufficient distress was reserved by the grant in question, it is evident that if the fifteen-day notice had been served, the grantor or landlord could have maintained ejectment under this section. It was so held under the corresponding section in the act of 1846, when leases similar in this respect were under consideration. (*Snyder case*, 13 N. Y. 299; *Slingerland case*, 26 N. Y. 580.)

It is also evident that unless this grant provides a right of re-entry for some reason other than a default of sufficient distress, ejectment cannot be maintained until such notice has been served. It appears upon an examination of the grant that the right to re-enter does not depend solely upon the ground last mentioned, but that if either of the covenants and conditions to be performed by the grantees shall be broken "then and in each and every such case" the right of re-entry is expressly conferred upon the grantor and his successor in title. Among those conditions and covenants is the agreement to pay the rent reserved at the time and place named. This covenant, 't is to be assumed for the purpose of this appeal, was broken by the defendant. In other words, the tenant covenanted to pay the rent and agreed that if he broke this covenant the landlord might re-enter, and subsequently he broke the cove-

Opinion of the Court, per VANN, J.

nant. The stipulation for a right to re-enter upon this ground is entirely independent of the stipulation giving that right in case of a failure of distress. The provisions are alternative, separated by a disjunctive conjunction and followed by the comprehensive words "that then and in each and every such case" a re-entry shall be lawful. Thus the plaintiff, who in his complaint founds his right to recover upon this breach alone, had "a subsisting right by law to re-enter for the failure to pay the rent," and as six months' rent was in arrear, the case comes within section 1504 of the Code, which authorizes a recovery of the property granted or demised, without any demand.

This construction of the grant is in exact accord with the reasoning of the court in *Van Rensselaer v. Jewett* (*supra*), where an instrument precisely the same in all respects, except as to names, dates and amounts, was under consideration (pp. 142, 143). The Chief Judge speaking for the Court in that case said: "The first question which I shall consider is, whether there is a right of re-entry reserved by the terms of the lease upon a simple breach of the covenant to pay the rent as reserved. * * * If we adhere to the language which the parties have used rather than go upon intentions not expressed, it is plain, as I think, that there are two conditions of re-entry provided for by the proviso. First, a right of re-entry if no 'sufficient distress can be found upon the premises to satisfy such rent due and in arrear, as aforesaid.' * * * And secondly, a right of re-entry 'if either of the covenants and conditions herein before contained on the part of the said party of the second part, his heirs and assigns, to be performed, fulfilled and kept, shall not be performed, fulfilled and kept, or shall be broken.' The covenant to pay rent, as, indeed, all the other covenants of the lessee, of which there are several, precede this clause in the lease and clearly come within the language as well as the meaning of this second proviso of re-entry and to which it is plainly applicable. The covenant is absolute and unqualified, and although there may be a sufficient distress to satisfy the rent both at the day it is made payable and at the expiration

Opinion of the Court, per VANN, J.

of the twenty-eight days next thereafter, the lessor is not bound to take his remedy by distress, but may have it by way of re-entry upon a breach of the covenant to pay rent."

In *Hosford v. Ballard* (39 N. Y. 147, 152), the court said that the Act of 1846 "is in terms applicable to a case in which the right of re-entry is by the grant or lease itself made to depend upon the default of a sufficiency of goods whereon to distrain, and nottwhere the right of re-entry is given by the lease or grant in default of the payment of the rent when it becomes due. Thus where the right of re-entry is reserved and given to a grantor or lessor, in any grant or lease, in default of a sufficiency of goods and chattels whereon to distrain for the satisfaction of any rent due, such entry may be made at any time after default in the payment of such rent, provided fifteen days' notice be given, etc. Obviously, this does not describe the cases in which the right of re-entry is reserved and given on default of payment, without any regard to the question whether there are goods and chattels on the premises or not." (See also *Van Rensseler v. Dennison*, 35 N. Y. 393; *Cruger v. McLaury*, 41 N. Y. 219; *Keeler v. Davis*, 5 Duer, 507.)

The *Snyder, Ball, and Slingerland* cases (*supra*), relied upon by the respondent, did not involve the point under consideration. In each of those cases the fifteen-day notice had been served and the action was brought, tried, decided and a recovery sustained upon that ground only. The effect of the breach of the covenant to pay rent and of the stipulation that if such covenant should be broken, the grantor or lessor might re-enter, was neither considered nor involved.

The judgment should be reversed and a new trial granted, with costs to abide the event.

All concur.

Judgment reversed.

Statement of case.

JOHN L. DOUGLASS, Appellant, v. THE MERCHANTS' INSURANCE COMPANY OF NEW YORK, Respondent.

Plaintiff, on January 1, 1857, entered defendant's service as secretary, at a yearly salary. He continued in such service until January 19, 1885, when he was, by defendant's board of directors, removed, and a successor *pro tem.* appointed. In an action to recover as damages the salary for the remainder of that year, there was no evidence that the original hiring was for a year other than the fact that plaintiff's salary was annual. One of defendant's by-laws which went into effect in 1850 provided that its officers, including the secretary, "shall respectively hold their offices during the pleasure of the board of directors, and until the appointment of a successor, either permanently or *pro tem.*" *Held*, that the action was not maintainable, that plaintiff was chargeable with notice of the by-law, and as no special contract which indicated any purpose to abridge the right of removal given by it was shown, it entered into and became part of the contract of employment; and that under the by-law the right of removal at any time was unqualified.

Soldiers' Home v. Shaffer (63 Ill. 243); *Martino v. C. F. Ins. Co.* (15 J. & S. 520), distinguished.

(Argued January 15, 1890; decided February 25, 1890.)

APPEAL from judgment of the General Term of the Supreme Court, in the first judicial department, entered upon an order made March 24, 1887, which affirmed a judgment in favor of defendant, entered upon a decision of the court on trial at the Circuit.

The nature of the action and the facts are sufficiently stated in the opinion.

Wm. W. Badger for appellant. No lawful discharge of this plaintiff was shown "upon the 19th day of January, 1885, at the regular meeting for that month." *Moody v. Leverick*, 4 Daly, 401-9; *Howard v. Daly*, 61 N. Y. 362; *Everson v. Howard*, 89 id. 527; *Perry v. Dickerson*, 7 Abb. [N. C.] 470-474; 85 N. Y. 350; *Goodman v. Pocock*, 15 Ad. & El. [N. S.] 576.) The saving grace of common sense and the ordinary obligations of common honesty require that a

Statement of case.

faithful servant after twenty-eight years of continuous service at "a yearly salary," should not be summarily and arbitrarily dismissed without cause and without any notice or pay. (1 Morawetz on Corporation, § 544; Story on Agency, § 466, Wood on Master and Servant, § 127; *Martino v. C. Ins. Co.*, 15 J. & S. 521; *King v. Steiren*, 44 Penn. St. 104; 19 Ark. 671; 9 id. 394; 24 Ala. 194; 19 Col. 291; Laws of 1849, chap. 308, § 12; Angell & Ames on Corp., §§ 333, 426; *Soldiers' Home v. Shaffer*, 63 Ill. 243-245; *Williams v. Byrne*, 7 Ad. & El. 177; *Costigan v. M. R. R. Co.*, 2 Den. 609, 613.) It is entirely settled that a contract for services for a yearly salary, if continued into succeeding years without further words, is thereby renewed by the year. (*Huntingdon v. Claffin*, 38 N. Y. 182; *Vail v. L. F. Co.*, 32 Barb. 564; *Tatterson v. S. Co.*, 106 Mass. 56; *Davis v. Marshall*, 6 H. & N. 916; *People v. A. & S. R. R. Co.*, 55 Barb. 564; *Smyth v. Darley*, 2 H. L. Cas. 789; *Rex v. Mayor, etc.*, 2 Burr, 738; *Brooklyn v. B. R. R. Co.*, 47 N. Y. 479; 76 id. 119; *Doll v. Noble*, 116 id. 230.) The ruling as to the burden of proof is plainly erroneous. (*Howard v. Daly*, 61 N. Y. 362.)

Francis Lynde Stetson for respondent. The plaintiff had no contract with the defendant for the year 1885, except subject to the by-law in question. (46 N. Y. 120; *Goodyear v. De La Vergne*, 10 Hun, 537; *Vail v. J., etc. Co.*, 32 Barb. 564-567; *Huntingdon v. Claffin*, 38 N. Y. 182; *Tucker v. P. & R. R. Co.*, 53 Hun, 139; 9 Wend. 379; *Scales v. Key*, 11 Ad. & El. 819.) The plaintiff was chargeable with notice of this by-law. (*Powell v. Milbank*, 2 W. Black. 851; 3 Wils. 355; Boone on Corp. § 61; Angell & Ames on Corp. § 359; *Bank v. Wollaston*, 3 Harr. 90; *S. Ins. Co. v. Perrine*, 7 Watts & S. 348; *Hunter v. S. M. Ins. Co.*, 26 La. Ann. 13, 403.) The by-law in question forming part of plaintiff's contract for 1885, accomplished its clear purpose, and reserved to the defendant a right to discharge the plaintiff at any time. (Wood on Master & Servant, 274; *Union Bank*

Opinion of the Court, per BRADLEY, J.

v. *Ridgeley*, 1 Harr. & G. 324-432; *D. Bank v. Chickering*, 3 Pick. 335; *E. Bank v. Rogers*, 7 N. H. 21; *Smith v. B. S. R. R. Co.*, 35 Hun, 204; *Tyler v. Ames*, 6 Lans. 280; *Spring v. A. C. Co.*, 24 Hun, 175.)

BRADLEY, J. The plaintiff, on or about the first day of January, 1857, went into the service of the defendant as secretary, at the yearly salary of \$1,500; his salary, from time to time changed, was, on the first of January, 1884, increased to \$4,500 a year. He continued as such secretary in the service of the defendant at that annual salary until January 19, 1885, when he was, by the board of directors of the defendant, removed from the office of secretary. He, having been paid up to February first, brought this action to recover as damages a sum equal to the salary for the residue, or eleven months, of the then current year. This claim is made for the alleged reason that he was in the defendant's service from year to year, and that the defendant could not, without liability to him for damages, discharge him from its service until the end of any year upon which he had entered in such service. When a party enters into service of another at a stipulated annual compensation or salary, and continues beyond a year, the presumption is that he does so on the same terms. (*Huntingdon v. Claffin*, 38 N. Y. 182; *Vail v. Jersey Little Falls Mfg Co.*, 32 Barb. 564; *Ranck v. Albright*, 36 Penn. St. 367; *Tatterson v. Suffolk Mfg. Co.*, 106 Mass. 56.)

There is no evidence that the original hiring was for a year other than in the fact that the plaintiff's salary was annual. The plaintiff, for his evidence in that respect, relied solely upon the admission in the defendant's answer. By the answer it is alleged that a by-law of the defendant known to the plaintiff was part of the contract of employment under which he went into and continued in its service. This by-law was adopted and went into effect in 1850, and provided that "the president, vice-president, secretary, surveyor and clerks shall respectively hold their offices during the pleasure of the

Opinion of the Court, per BRADLEY, J.

board of directors, and until the appointment of a successor, either permanent or *pro tem.*, and no officer or clerk shall be removed without a concurrence of a majority of the whole board of directors.”] A new edition of the by-laws, including this one, was printed and issued in 1861, under the direction of a committee, in a book in which appeared the name of the plaintiff as secretary. The plaintiff had, or was chargeable with, knowledge of this by-law, and it may be assumed that it constituted part of the contract of his employment under which he served as secretary of the defendant. And the main question is whether the defendant had the right in the manner mentioned in the by-law, without cause, to terminate the plaintiff's service as secretary before the end of the current year, and not subject itself to liability to him for damages as for breach of contract.

It is urged on the part of the plaintiff that he was in service under a contract for a year, and that the by-law was not in the way of making such a contract effectual; and when made the power of removal could be exercised to take effect only at the expiration of the year.

In *Soldiers' Home v. Shaffer* (63 Ill. 243), cited in support of that proposition, the plaintiff's charter provided that the trustees might remove any officer or employee if the interests of the institution required the removal. The plaintiff there was, by special contract, hired for a year, and the court held that a corporation loses its general power of removal contained in its charter if it make a special contract.] It may be observed that in the case cited the power of removal was not unqualified or to be exercised at pleasure. And in *Martino v. Commerce Fire Ins. Co.* (15 J. & S. 520) it was held that the by-laws of the defendant providing that officers, clerks, etc., should be elected during the pleasure of the board, did not deny to the defendant the power by special contract to overcome it or set it aside.

It may be assumed, for the purposes of the question, that this is within the power of the board which creates the by-laws, and that when it appears that a special contract is

Opinion of the Court, per BRADLEY, J.

dictum
made by such board in terms which indicate an intent of the parties to exclude from it the operation of the by-laws having relation to the right of terminating service, such contract of employment may not be subject to it. The employment of the plaintiff does not come within that proposition. He went into the defendant's service upward of twenty-eight years before the time of his removal. There does not appear to have been any special contract as to term of service. The compensation was designated as a yearly salary, which the plaintiff, in his complaint, alleges was payable in monthly or quarterly installments. This would indicate that his service for a year was contemplated, and the terms would presumptively be the same each subsequent year except so far as modified by the parties, and without some reserved right of termination it may be assumed that his service was not terminable without cause until the end of any current year.]
(*Williams v. Byrne*, 7 Adol. & Ellis, 177.)

But here was no special contract which indicated any purpose to abridge the right of removal at pleasure given by the by-law which entered into the contract of employment, and subject to which the plaintiff went into and continued in the defendant's service until this reserved power was exercised. Nor is it seen that this right of removal was qualified in respect to the time of its exercise. Our attention is called to but very little judicial authority upon this question. In *Hunter v. Sun Mut. Ins. Co.* (26 La. Ann. 13.), the plaintiff was employed by the defendant for one year from in February, 1869, which he served, and on the expiration of that term he was employed by the defendant for another year. He was discharged in April of the second year without cause, and brought his action to recover damages for alleged breach of the contract.

There was a by-law of the defendant, in terms, giving the right to remove its officers at pleasure. It was there held that the officer so employed, was presumed to have known of the existence of the by-law, that it was part of the contract, and the law governing their rights in that respect, and "there-

Statement of case

fore the plaintiff knew the precarious and was not entitled to recover.

In *Smith v. Buffalo Street R. R.* question as to the right to discharge a term, arose upon a provision in the contract might discharge him "at any time." The right to discharge him was unqualified the power of removal at any time must have been reserved in the contract of employment to have been regularly exercised. It was the duty of the board of directors by concurring the whole board, and a secretary *pro tempore* and he was made permanent secretary the following month. No question was made as to the regularity of the meeting of the board when the removal was made. Nor does there appear to be any support for the contention that it was not the removal may have been accomplished.

The judgment should be affirmed.

All concur.

Judgment affirmed.

GEORGE H. BRENNAN, Appellant, v. Respondents.

The duty devolves upon a master, before putting an unskilled man in charge of dangerous machinery, of which he is not acquainted, to instruct and supervise him in the discharge of his duty.

If for the purpose of instruction the master selects a man for employment, the latter must be, not simply as competent, but absolutely competent; if he is incompetent in the discharge of the duty of instructor, or if he discontinues the duty of instruction, or if he discontinues the duty of supervision, and in consequence the promotion of the master is liable.

In an action to recover damages for injuries received by the falling of an elevator which defendants had no experience or knowledge, was selected to run the elevator, and being assigned to instruct him; while left

instructor the accident happened. At defendants request charged. "If the jury find as matter of fact that the plaintiff under instruction of a competent instructor, and that he (the plaintiff) was as well acquainted as defendants with the nature and character of service which he undertook to perform, he cannot recover." *H*

(Argued January 20, 1890; decided February 25, 1890.)

APPEAL from a judgment of the General Term of the Court of Common Pleas for the city and county of New York entered upon an order made December 6, 1886, which affirmed a judgment in favor of defendants entered upon a verdict in this action was brought by the plaintiff to recover damages for personal injuries occasioned by the fall of an elevator. The case has been twice tried. On the first trial the plaintiff was dismissed. This was reversed by the General Term and a new trial ordered. (Reported below 133 N. Y. 208.) On the second trial the jury rendered a verdict for defendants, and this appeal is to review such judgment.

The defendants were a firm doing business in manufacturing preserves in the city of New York. The plaintiff had been in defendants' employment in such business as one of their porters for a long time prior to March 1, 1881, when an accident occurred.

In the month of February, 1881, the defendant caused a building to be erected and put into their building an elevator to be operated by steam, and to be used in carrying persons and goods to the various floors and lofts in the building. Henry Dillworth (who was a brother of the defendant William H. Dillworth) was general superintendent of the defendants' establishment and exercised the functions of hiring and discharging employees in that business.

The defendants, knowing that the plaintiff had no acquaintance or skill in running said elevator, and had never before performed or attempted to perform such a service, informed him that they had selected him for that purpose, and that said Henry C. Dillworth, who had the requisite knowledge and experience, would instruct and qualify him.

Statement of case.

The elevator was built and furnished to the defendants by the firm of Reedy & Co., who were doing a large business in that line. Mulcahy and Sanders, two employees of Reedy & Co. who had constructed the elevator, placed it and the apparatus in position and prepared it for use. It was claimed by the defendants that Mulcahy gave instruction to the plaintiff, at least in part, and there was some evidence tending to show that at times when the elevator was in operation carrying things from below to the floors above, and with which Mulcahy was engaged in respect to another elevator, or in making some changes in connection therewith, he had given the plaintiff, when he was with him in the car or elevator, some instructions in regard to running it.

The elevator had been used more or less on Monday, the 28th day of February, 1881, and was in use on the Tuesday succeeding, and at about five o'clock on this latter day, while the elevator was carrying three beams to the upper floor of the building, and at a time when the plaintiff, with another of the employees of defendants, was in the elevator, and just after two of the beams had been taken out at the third floor, leaving the third and longer beam with its lower end resting on the floor of the elevator and its upper end protruding beyond the top of the elevator, the elevator was started to the floor above. The elevator was stopped between the third and fourth floors in order to take out the third beam before the upper end of it should come against the roof, and while this was being done the elevator was either started by somebody, the evidence leaving it in some doubt who that person was, or was started without anyone's interference from some inherent defect in the machinery; and while thus moving up the upper end of the beam came in collision with the roof, which caused the cogs of the wheel upon the apparatus, one or more of them, to break, and thereby the elevator fell to the bottom with the plaintiff in the car, and by means of which the plaintiff was seriously injured.

Further facts appear in the opinion.

Statement of case.

Edward C. James for appellant. Defendants are liable in this case, because Henry C. Dillworth was the plaintiff's instructor in the operation of the elevator, and *pro hac vice* represented them. (*Loughlin v. State*, 105 N. Y. 159, 162-3; *Crispin v. Babbitt*, 81 id. 516, 521; *Brennan v. Gordon*, 13 Daly, 208; *Scott v. L. D. Co.*, 3 H. & C. 596; *Lyons v. Rosenthal*, 11 Hun, 46; *Roberts v. Johnson*, 58 N. Y. 613; *Seybolt v. Railway Co.*, 95 id. 562-569; *Mullen v. St. John*, 57 id. 567; *Hill v. R. R. Co.*, 109 id. 239; *Gerlach v. Edelmeyer*, 15 J. & S. 292; 88 N. Y. 645.) To order an unskilled servant to do anything requiring skill, in respect to dangerous machinery, of the use of which he is ignorant, without first instructing him in its use, is negligence on the part of a master, rendering him liable to the servant for an injury incurred in attempting to obey his order. (*Lalor v. Railroad Co.*, 53 Ill. 401; *Railroad Co. v. Fort*, 17 Wall. 554; *Siegel v. Schwartz*, 2 T. & C. 353; *Connolly v. Poillon*, 41 Barb. 366; *Grizzle v. Frost*, 3 F. & F. 622; Wood on Mast. & Serv. §§ 349, 350, 444.) It was error on the part of the court to instruct the jury that the presumption that the master had discharged his duty, was not overcome by proving that some of the instrumentalities of the masters's business proved insufficient, and thus injury came to the one suing. It was also error to instruct the jury that the fact that machinery or appliances used in the prosecution of the business were defective or insufficient, "does not tend, even *prima facie*, to establish negligence on the part of the employer," and to instruct them that the master's want of care "cannot result as an inference from the circumstances that the materials or resources of the business were, in fact, defective." (*Gerlach v. Edelmeyer*, 15 J. & S. 292; 88 N. Y. 645.) The court had no right to submit questions to be answered if the jury found for the plaintiff, but not to be answered if they found for the defendants. No such practice is authorized by the Code. (Code Civ. Pro., §§ 1187, 1188; *Taylor v. Ketchum*, 5 Robt. 507, 514; *Moses v. Priest*, 19 Abb. Pr. 314; *Murray v. N. Y. L. Ins. Co.* 96 N. Y. 614, 621-622; *Ebersole v. N. C. R. Co.* 23 Hun,

Opinion of the Court, per POTTER, J.

114; *Maasvell v. Boyne*, 36 Ind. 120; *Crane v. Reeder*, 25 Mich. 303; *Doon v. Walker*, 15 Neb. 339; *Dempsey v. Mayor, etc.*, 10 Daly, 417.)

E. H. Benn for respondent. If there had been secret defects in the clutch or the machinery, the defendants, not being the manufacturers, could not be held even to warrant against such defects. (21 N. Y. 552, 555.) The elevator was of a kind in common and general use; they knowing of no defects, took all the care and precaution that could be required of them, and they would not be liable even if there was an unknown defect in the machinery. (*Probst v. Delamater*, 100 N. Y. 272; *Burke v. Witherbee*, 98 id. 562; *Fuller v. Jewett*, 80 id. 46; *Devlin v. Smith*, 89 id. 470; *Cooke v. Lalance*, 1 N. Y. S. R. 590; *Hudson v. O. S. Co.*, 110 N. Y. 625; *Marsh v. Chickering*, 101 id. 397.) If the accident was caused by what Harry Dillworth did in the business of taking up and unloading the beams, the defendants cannot be held liable, as in doing that work Harry Dillworth and the plaintiff were co-servants. (*Hussey v. Coger*, 112 N. Y. 614; *Loughlin v. State of N. Y.*, 105 id. 159; *Crispin v. Babbitt*, 81 id. 516.) That plaintiff was free from negligence, is a fact which plaintiff must prove in such actions even if there is no answer at all. There was no occasion for the allegation in the complaint. (*Lee v. T. C. G. L. Co.*, 98 N. Y. 119; *Hart v. H. R. B. Co.*, 84 id. 57; *Hale v. Smith*, 78 id. 480; *Caldwell v. N. J. S. Co.*, 47 id. 282; *Loser v. Buchanan*, 54 id. 492; *Crist v. E. R. Co.*, 58 id. 638.) The objections to what Mulcahy said were properly overruled for these reasons. (*Morton v. Gould*, 69 N. Y. 221; *McKeon v. See*, 51 id. 300; *Wood v. Kilpatrick*, 85 id. 414; *Atkins v. Elwell*, 45 id. 753.)

POTTER, J. This action is brought upon the theory that the plaintiff being inexperienced in the running of an elevator, and that to the knowledge of defendant, and that having been assigned by the defendant to perform this duty, the defendant was bound to qualify him for such service, and that in doing

Opinion of the Court, per POTTER, J.

so if the machinery was found to be defective or Henry Dillworth, who was assigned as instructor for the plaintiff, was incompetent to perform this duty, or was negligent in his manner of performing it, and that by reason of the premises the plaintiff was injured, the defendants are liable to pay him the damage he had sustained.

The principles of law involved are well defined, and are not seriously controverted by the counsel upon this appeal. Those principles are, that a duty devolved upon the master of a servant hitherto in the capacity of a common laborer, before such laborer should be put in charge of dangerous machinery with which he is not acquainted, to instruct and qualify him for such new duty. (*Connolly v. Poillon*, 41 Barb. 366, 369; *Ryan v. Fowler*, 24 N. Y. 410; *Noyes v. Smith*, 28 Vt. 59; *Railroad Co. v. Fort*, 17 Wall. 553.)

That if the master selects a co-servant in his employment to instruct and qualify the servant for the new and more dangerous service, the master must select a competent instructor or be liable for his incompetency or his negligence while performing the duty of instructor, or for discontinuance of his instruction until it is completed, by which the promoted servant is injured, and if such is the case, the master will be liable for the injury, and it will be no defense that the injury was caused by one servant to his co-servant, for the servant whose negligence caused the injury stands for the master and the latter is liable in such case the same as if the injury was caused by the personal negligence of the master. (*Mann v. D. & H. C. Co.*, 91 N. Y. 500; *Wood on Mast. & Serv.* §§ 349, 350, 444; *Brennan v. Gordon*, 13 Daly, 208, 210, this case on former appeal; *Loughlin v. State of N. Y.*, 105 N. Y. 159, 162-3; *Railroad Co. v. Fort*, 17 Wall. 553.)

The questions in dispute in this case, therefore, are whether the person giving the instructions for the defendants to qualify the plaintiff to run and manage the elevator, properly performed that duty, or was himself guilty of negligence in starting the elevator, or leaving it in plaintiff's charge before he was qualified, or whether the machinery was imperfect in

Opinion of the Court, per POTTER, J.

any respect, and the defendants were negligent in selecting and putting it in use. If either of these conditions is shown to exist by proper and sufficient evidence to support it, the defendants would be liable to plaintiff for the injuries he sustained. It does not strike me that it can be reasonably claimed that the machinery was defective in starting up at the time the accident occurred from inherent defect and without somebody's interference. It was not intended to move and never had been known to move, unless the rope was applied to start it. The testimony in this case is abundant to show that somebody applied the rope to start the elevator up. The difficulty just here is that the evidence is too abundant, so much so that it is difficult from the superabundance of it to decide who it was that applied the rope to move the elevator up.

The case seems to have been tried upon the true theory to determine whether or not the defendants are liable, and if any mistrial has taken place it is owing to errors in the charge of the learned trial judge, or in receiving or rejecting testimony or in rulings in conducting the trial.

It is very evident, from a perusal of the case and the exceptions to the rulings upon the evidence, and the requests to charge and the exceptions thereto, that the trial was very closely contested, and it would be somewhat remarkable if a trial court, in the hurry and confusion incident to a trial conducted in this manner, should have avoided the commission of some error. In order to properly dispose of these exceptions, it is necessary to have a just understanding of the questions upon trial. They are whether Henry Dillworth was designated by the defendants as the instructor of the plaintiff to run and manage the elevator, and if so, whether he properly and sufficiently performed the duty thus devolved upon him by the defendants.

I think there was error in the charge of the court made at the request of defendant "if the jury find as matter of fact that the plaintiff was put under instruction of a competent instructor, and that the instructor was as well acquainted as defendants with the nature and character of the service which

Opinion of the Court, per POTTER, J.

he undertook to perform, he cannot recover." The jury could not otherwise understand this instruction than to mean that the defendants' whole duty to the plaintiff was performed when they assigned as competent an instructor to plaintiff as the defendants were. This was erroneous in two respects. The *degree* of the instructor's competency was gauged by the competency of the defendants. The plaintiff was entitled to have, and the defendants were bound to provide him with, an instructor competent to teach the art of managing an elevator, regardless of the competency of the defendants in that respect, and of which there was no proof whatever in the case. But the defendants were not only bound to furnish plaintiff with an instructor absolutely competent to manage an elevator, but the defendants were also bound to provide such an instructor for a reasonable length of time to teach the plaintiff how to manage the elevator, and that the instructor should be guilty of no negligence to the injury of the plaintiff while he was being instructed. These relations spring from the fact that during this period the instructor is doing the work and standing in the place of the defendants, the master.

There are other questions in the case deserving consideration upon this appeal, but I do not deem it necessary or worth the while to discuss them, having reached the conclusion that a new trial must be granted on account of the ruling already considered.

The judgment should be reversed and a new trial granted, with costs to abide the event.

All concur, except HAIGHT and PARKER, JJ., not sitting.
Judgment reversed.

Statement of case.

JULIA M. FERRY, Respondent, v. THE MANHATTAN RAILWAY COMPANY, Appellant.

In an action to recover damages for injuries received by plaintiff while attempting to alight from one of defendant's trains, it appeared that as plaintiff was about stepping from the front platform of the fourth and last car the train suddenly started and she was thrown down and injured; between the third and fourth cars a brakeman was stationed whose duty was to open the gates to permit the egress and ingress of passengers and then to close them, and give a signal by a pull upon a bell rope extending from the bell on the engine to where said brakeman was stationed; this signal was communicated to the next forward brakeman, whose duty it was to so hold the rope as not to permit the signal to pass him, and when he closed the gates under his control to transmit the signal by two pulls of the rope and so on until the signal reached the engineer, whose duty it was then to start the train. In this case the signal was given by the brakeman between the second and third cars; he testified that he received a signal which he supposed was given by the rear brakeman; the latter, however, testified that he gave none. To explain this, evidence was given on the part of the defendant tending to show that a passenger standing in the third car about the time the train stopped, caught hold of the bell rope to steady himself. Plaintiff gave evidence tending to impeach the credibility of the forward brakeman. The court charged that if the jury found the train was started by the passenger, defendant was not negligent, but if not so started, it was negligent. Defendant's counsel then requested the court to charge, "that there was no proof that there was any vice in the system of communicating signals and the jury are not to consider the question;" this was refused except as charged. *Held*, no error; that the proposition contained in the request could have no consideration unless the act of the passenger caused the signal, and as the court had charged, in that case, defendant was not negligent, this rendered the question as to any defect in the system of signalling unimportant.

Reported below (22 J. & S. 325).

(Argued January 21, 1890; decided February 25, 1890.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made May 2, 1887, which affirmed a judgment in favor of plaintiff entered upon a verdict.

The nature of the action and the facts are sufficiently stated in the opinion.

Statement of case.

Julien T. Davies for appellant. It is the legal right of counsel to submit to the court propositions of law, and the court is bound to instruct the jury upon each proposition so submitted. (*Zabriskie v. Smith*, 13 N. Y. 322, 338; *Chapman v. McCormack*, 86 id. 479; *Schile v. Brokhaus*, 80 id. 614; *Taylor v. Ketcham*, 5 Robt. 507, 520.) Where it appears that each request is separately made and passed upon and excepted to, the exception will be held sufficiently specific. (*Dunckel v. Wiles*, 11 N. Y. 420.) Where the court, upon the trial, has refused to charge a request to which a party was entitled, the latter is entitled to a new trial if it appears that he might have been prejudiced. (*Green v. White*, 37 N. Y. 406, 407; *Thacher v. Jones*, 31 Me. 528, 534; *Lane v. Crombie*, 12 Pick. 177; *Clark v. Dutcher*, 9 Cow. 674; *C. & A. R. R. Co. v. Belknap*, 21 Wend. 354; *People v. Wiley*, 3 Hill, 194; *Erben v. Lorillard*, 19 N. Y. 299.)

Benjamin G. Hitchings for respondent. The motion for a non-suit was properly denied. (Laws of 1881, chap. 399; *Roberts v. Johnson*, 58 N. Y. 613; *Bartholomew v. N. Y. C. R. R. Co.*, 102 id. 613; *Seybolt v. N. Y. L. E. & W. R. R. Co.*, 95 id. 562; *Breen v. N. Y. C. & H. R. R. R. Co.*, 109 id. 297; *Holbrook's Case*, 12 id. 236; *Wenzlick v. McCotter*, 87 id. 125; *Jackson v. Leggett*, 7 Wend. 377; *Calvin v. Burnet*, 2 Hill, 620; *Mayor, etc., v. Mason*, 1 Abb. Pr. 344; *Calygrove v. H. R. R. Co.*, 6 Duer, 382, 412; *McCotter v. Hooker*, 8 N. Y. 497; *S. & S. P. R. Co. v. Thatcher*, 11 id. 102; *Leslie v. K. I. Co.*, 63 id. 27.) A jury is not bound to believe the testimony of a witness on a controverted question, though not directly contradicted or directly impeached. (*Elwood v. W. U. T. Co.*, 45 N. Y. 553; *Kohler v. Adler*, 78 id. 291; *Kavanaugh v. Wilson*, 70 id. 177; *Stilwell v. Carpenter*, 2 Abb. [N. C.] 257; *N. Y. & B. F. Co. v. Moore*, 18 id. 106; *Woolfhart v. Berkhart*, 92 N. Y. 497; *Nicholson v. Conner*, 8 Daly, 212; *Ernst v. H. R. R. R. Co.*, 38 N. Y. 22.) This court will not send a case back, where the sole defense set up is obviously untenable. (*Edmonston v. McLeod*, 16 N. Y. 543; *Foot v. A. Ins. Co.* 61 id. 578; *Capron v. Thompson*, 86 id. 418.)

Opinion of the Court, per BRADLEY, J.

BRADLEY, J. The plaintiff was one of a party of nine persons who, at One Hundred and Eleventh street in the city of New York, entered the last one of four cars constituting a train upon the Second Avenue Elevated Railway, operated by the defendant, and when the train stopped at Fifty-seventh street they proceeded to alight from the car. Six of them had done so, and the plaintiff, next following them, was about stepping from the car when the train suddenly started, as some of the witnesses say, with a jerk, and she was thrown down and severely injured. She brought this action to recover damages for the injury so received, which she charges was occasioned solely by the negligence of the defendant. It was the duty of the latter to give passengers a reasonable opportunity to leave the train at stations where they wished to alight. The conclusion was warranted by the evidence that no fault of the plaintiff contributed to the injury. And as the train and its movement were apparently under the control of the employees of the defendant, the presumption was permitted that the failure to give the plaintiff the opportunity to get from the car before the train started, and its consequences to her, were attributable to the negligence of the defendant. (*Breen v. N. Y. C. & H. R. R. Co.*, 109 N. Y. 297.) And the burden was cast upon the defendant to repel such presumption. (*Bowen v. N. Y. C. R. R. Co.*, 18 N. Y. 408; *Caldwell v. N. J. Steamboat Co.*, 47 id. 282.) This it sought to do by proving the system and the manner of performing the service of running its trains as applied to the one in question, and by giving evidence which it was claimed tended to show that this accident was not chargeable to any fault in either. This was a train of four cars. The places for the passengers to depart from it were at the connecting ends of the third and fourth, second and third, and first and second cars; that at the latter place was the conductor, and at each of the other places mentioned was a brakeman, whose duties respectively at stations were to open the gates to permit the egress and ingress of passengers, and when that was accomplished to close the gates and give

Opinion of the Court, per BRADLEY, J.

signals, which, when transmitted to the engineer, it was his duty to start the train and proceed to the next station. This signal was given by means of a bell-rope located near the roof-ceiling of the cars, and extending from the bell on the engine to the place where the rear brakeman was stationed.

The system required the latter, when the getting off and on of the passengers at that point was completed at a station, to give the signal to the next forward brakeman, whose duty it was to so hold the rope as not to permit the signal to pass him, and when he closed the gates under his control to transmit the signal by two pulls of the cord to the conductor, whose duty it was in like manner to receive it, and when he closed the gates under his control to give the signal to the engineer to start the train. In this instance the signal was given by the brakeman between the second and third cars to the conductor, and by the latter to the engineer, and the train started just as the plaintiff was proceeding to step from the fourth car to the station platform. The brakeman between that and the third car testified that he had then given no signal. And to explain the cause of the signal to the brakeman between the second and the third cars, evidence was given tending to prove that a passenger standing in the third car, about the time the train stopped, to steady himself caught hold of the bell-cord, which may have had the effect of a signal to the brakeman or guard at the front end of that car, and caused its transmission by him to the conductor and thence to the engineer. The last mentioned brakeman testified that he did receive a signal, which he supposing came from the rear brakeman transmitted it to the conductor. There was evidence on the part of the plaintiff tending to impeach the credibility, as a witness, of the last-mentioned brakeman, which permitted the jury to conclude that his evidence was not entitled to credit. And in view of that question, which was submitted to the jury, the further question, as one of fact, whether any signal from any source in the rear of his position as guard was received by him, as he testified, was also submitted to them. And in view of the charge as made to them by the trial court, they evidently found that his

Opinion of the Court, per BRADLEY, J.

evidence to the effect that he did receive a signal was not true. This was warranted by the evidence. The defendant's counsel does not, on this review, complain of the submission of that question of fact to the jury, but does argue that the court erred in the refusal to charge as requested, that "there was no proof that there was any vice in the system of communicating signals, and the jury are not to consider this question." Also that "there is not a particle of evidence that the method of fixing the bell-rope was not the best method of fixing it, and the jury are not to take this question into consideration." These propositions had relation to the fact, if so found, that the signal was given by the act of the passenger in taking hold of the rope, which the jury were permitted by the evidence to find. When requested to charge those propositions respectively, the court refused except as charged, and exceptions were taken. The court had charged the jury that if they found that the train was started by the passenger in the manner he says he did it, then the defendant was not negligent and the plaintiff could not recover; but if on the other hand they found that the train was not started by the passenger in that manner, that is if he did not give the signal to the brakeman, which caused the latter to signal the conductor, then the defendant was negligent. This seems to have fully covered those propositions, which the court was so requested to submit to the jury, so far as they had any bearing upon any question presented at the trial. They could have no consideration unless the jury found that the act of the passenger caused a signal to the brakeman which led him to extend it. And the court had distinctly charged the jury that if they so found the fact, the accident was without fault of the defendant and the plaintiff could not recover. This covered the entire purpose and effect, which these propositions could have served or had given to them, and went further in favor of the defendant. So that their finding that the signal was caused by the act of the passenger in taking hold of the bell-cord, would close further inquiry by the jury and require them to find a verdict for the defendant. The defense rested upon the evidence

Statement of case.

tending to prove that fact. And the court by the charge gave to the defendant the full benefit of it if the jury so found it. This rendered unimportant the inquiry whether defendant's system of service was unobjectionable and the bell-cord properly located or placed where it best could have protection against irregular disturbance and with a view to the safety of passengers. There seems to have been no opportunity possible for the defendant to be prejudiced by the refusal of the court to charge further than it had already charged the jury on that subject. It, therefore, is unnecessary to consider the question whether the defendant's requests should otherwise have been granted.

As those are the only exceptions urged upon our attention, and as we think they or any of the others are not well taken, the judgment should be affirmed.

All concur, except HAIGHT and PARKER, JJ., not sitting.

Judgment affirmed.

LEVI P. ROSE, Appellant, v. DAVID HAWLEY et al., Respondents.

Plaintiff, in 1848, conveyed to the town of Yonkers a tract of land in the village of Yonkers; by the terms of his deed the conveyance was upon the condition that a certain portion of said land should thereafter be and remain a part of a street named, and never be used for any other purpose, and that the residue of the premises conveyed "shall forever hereafter remain public and open as a public highway, and that no house, building or other erection whatsoever, except a public monument, shall ever be built or erected or permitted upon the said land, or any part thereof." The village was not then, but was afterward incorporated, and subsequently was incorporated as a city, and vested with the rights of property of the town. (Chap. 331, Laws of 1855; chap. 866, Laws of 1872.) In an action of ejectment based on the ground of a breach of said conditions, evidence was given tending to show that the premises in question were, at the time of the conveyance, bounded by a building, which was afterward taken down and a new one erected, the wall of which encroached about sixteen inches upon said premises; the location of the line however was in dispute, and there was other evidence to the effect that there was no encroachment, and if any in fact existed, it did not appear it was with defendant's knowledge. It also appeared that an area on the south side

Statement of case.

of said building further encroached about six feet upon said premises; that said area was covered by a sidewalk in which was a grating and a door covering a stairway, which, when open, is an obstruction, but when closed is, with the grating, flush with the sidewalk. It did not appear that the door had, by being left open, been an obstruction. *Held*, that while the purpose of the conditions was to preserve the use of the premises for a street or public highway, and anything erected upon them inconsistent with that use would be a violation thereof, it could not be assumed that what is usually or commonly permitted or required in streets of villages and cities came within the prohibition, and the construction of the area was not an erection upon the land within the meaning of the conditions, nor was it rendered so by use.

Also, *held*, that the city was not chargeable with notice of any encroachment of the wall of the building upon the premises, and, conceding it existed as, it was without permission or knowledge on the part of the city, it could not be held to be a breach of the condition; that to justify such a claim and thereby to defeat the title, it must appear that the encroachment was in some sense permitted by the city.

The ground upon which the title of a grantee may be defeated and a claim of forfeiture supported, as for breach of condition subsequent, must be substantial and clearly established.

It seems, the duty imposed upon the municipal authorities was that of diligence to protect the premises for the declared public use and against the prohibited invasion, and they were required to observe that of which reasonable diligence would advise them in that respect.

It seems, also, that a grantor of property for a specified public use, may subject the title to liability of forfeiture for breach of a condition expressed in his deed.

It appeared that plaintiff had observed the erection of the building, the wall of which it was claimed encroached on the reserved premises in 1857; that he knew when the wall was rebuilt in 1866, and protested, but never called the attention of defendant's board of trustees to the matter. *Held*, it could not be held as matter of law that he waived his right to assert by action the alleged breach.

(Argued January 23, 1890; decided February 25, 1890.)

APPEAL from order of the General Term of the Supreme Court in the second judicial department, made July 1, 1887, which reversed a judgment in favor of plaintiff, entered upon a trial by the court without a jury, and granted a new trial.

This was an action of ejectment.

On December 30, 1848, the plaintiff, by a deed to the town of Yonkers in the county of Westchester, expressing a con-

Statement of case.

sideration of \$700, conveyed a parcel of land situate in the village of Yonkers bounded as follows: "Beginning at the easterly side of the old New York and Albany Post road at the south-west corner of the piazza of a new brick store belonging to said Levi P. Rose, and running thence along the southerly side of said brick store and of a brick wall attached to the same, south, sixty-two degrees and forty-five minutes east, sixty-three feet and four inches to a corner in said wall; thence still along said wall north, sixty-five degrees east, twenty feet to the most easterly corner of said wall; thence south, sixty-two degrees and forty-five minutes east, twelve feet and six inches to the westerly side of a new street known in the village of Yonkers by the name of Academy street; thence along the westerly side of said Academy street south, sixty-five degrees west, one hundred and three feet to the north-easterly side of another street known in the village of Yonkers by the name of Mechanic street; thence along the same north, eighteen degrees and thirty minutes west, twenty-nine feet to the aforesaid easterly side of the old New York and Albany Post road; and thence along the same north, twenty-six degrees east, forty-six feet to the place of beginning, containing eighty-four and 84-100 of an acre. * * * excepting and reserving, and this coveyance is upon the express condition that the strip of land forming part of the premises above described and being twelve feet and six inches in width and extending along the said Academy street shall hereafter be and remain a part of Academy street, and shall never be used for any other purpose whatsoever. And also that all the residue of the said land hereby conveyed shall forever hereafter remain public and open as a public highway, and that no house, building or other erection whatsoever except a public monument shall ever be built or erected or permitted upon the said land or upon any part thereof."

The defendant Hawley afterwards became the owner of the premises adjoining on the north the land so conveyed. And the village of Yonkers was incorporated as a city.

This is an action of ejectment brought to recover the pos-

Statement of case.

session of the premises on the alleged ground of breach of the condition in the grant of the plaintiff to the town of Yonkers.

Further facts appear in the opinion.

James M. Hunt for appellant. The findings of fact made by the trial judge cannot be questioned, if the case contain any evidence to support the same. (Code Civ. Pro., §§ 1318, 1338; *Lewis v. Barton*, 106 N. Y. 70, 73; *Prosser v. T. First N. B.*, Id. 677; *R. L. R. Co. v. Roach*, 97 id. 378.) There is evidence to support each finding of fact made by the trial judge. (*Merrill v. C. C. Co.*, 114 N. Y. 216, 220; *Serviss v. McDonnell*, 107 id. 265; *Wellington v. Morey*, 90 id. 656; *Vose v. Cockroft*, 44 id. 422; *Delaney v. Brett*, 51 id. 78; *Cruger v. McLaury*, 41 id. 227; *Post v. Weil*, 115 id. 361, 376; *Avery v. N. Y. C. & H. R. R. Co.*, 106 id. 142.) The motions made at the trial to dismiss plaintiff's complaint and for a non-suit were properly denied. (*Moore v. Pitts*, 53 N. Y. 85, 89, 92; *Coleman v. Beach*, 97 id. 545, 553, 554; 1 R. S. 748, § 2; 3 id. 2205, § 2; *Child v. Chappell*, 9 N. Y. 246; *Bank of Utica v. Mersereau*, 3 Barb. Ch. 528, 567; *Smith v. Babcock*, 36 N. Y. 167, 168; *Hoag v. Hoag*, 35 id. 469; *Prevot v. Lawrence*, 51 id. 219, 222; *Hetzel v. Barber*, 69 id. 1, 15; *Whiting v. Edmunds*, 94 id. 309, 312, 313, 314; *Gray v. Blanchard*, 8 Pick. 284; *Jackson v. Chrysler*, 1 John. Cas. 125; *Shepherd's Touchstone*, 117; *Lancy v. Ganong*, 9 N. Y. 24; *Tinkham v. E. R. Co.*, 53 Barb. 393; 2 Wash. on Real Property [3d ed.] 16; *Miller v. Platt*, 5 Duer, 272; *Ludlow v. N. Y. & H. R. R. Co.*, 12 Hun, 440, 446; *Bigelow on Estoppel*, 484; *N. Y. R. Co. v. Rothery*, 107 N. Y. 310; *Uline v. N. Y. C. & H. R. R. Co.*, 101 id. 98; Code Civ. Pro. §§ 447, 1516, 1517; Old Code, § 118; *Mahady v. B. R. R. Co.*, 91 N. Y. 148; *Jacobson v. Andreas*, 7 Wend. 152; Laws of 1880, chap. 245; *Plumb v. Tubbs*, 41 N. Y. 442; *Mott v. Palmer*, 1 N. Y. 564, 569; *Canfield v. Ford*, 28 Barb. 336; R. S. chap. 13, § 2; Laws of 1883, 832; *Coster v. Peters*, 5 Robt. 192, 202;

Statement of case.

Vail v. L. I. R. R. Co., 106 N. Y. 283; *Atlantic Dock Co. v. Leavitt*, 54 id. 35; *Spaulding v. Hallenbeck*, 35 id. 206; *Maynard v. Maynard*, 4 Edw. Ch. 711, 716; *Jackson v. Allen*, 3 Cow. 220; *Post v. Weil*, 8 Hun, 418; *Gilbert v. Peteler*, 38 N. Y. 165, 168; *Craig v. Wells*, 11 id. 315, 320; *Strong v. City of Brooklyn*, 68 id. 1-10; *Bradstreet v. Clarke*, 12 Wend. 602, 677; *Tyler v. Heidorn*, 46 Barb. 455-456; 48 N. Y. 671; 2 R. S. 304, §§ 25, 505; Taylor on Landl. & Ten. 332; Roscoe on Penal Act. 497; *Coe v. Clay*, 5 Bing. 440; *Trull v. Granger*, 8 N. Y. 118; *Van Rensselaer v. Stingerland*, 26 id. 587; Code Civ. Pro. chap. 4, §§ 362, 376; *Sturges v. Parkhurst*, 18 J. & S. 306; *Roscel v. Wickham*, 36 Barb. 386; *M. E. Church v. Brownell*, 5 Hun, 466; *Miller v. Platt*, 5 Duer, 272; *Woods v. Squires*, 1 Hun, 481; *Tyler v. Heidorn*, 46 Barb. 439; 48 N. Y. 671; *Caggar v. Lansing*, 64 N. Y. 417, 430; *Van Rensselaer v. Barringer*, 39 id. 9, 15; *Bedell v. Shaw*, 59 id. 46, 49; *Porter v. McGrath*, 9 J. & S. 104; *M. E. Ch. v. Brownell*, 5 Hun, 466; *Bliss v. Johnson*, 94 N. Y. 235, 242; *Kirk v. Smith*, 9 Wheat. 241, 288; 48 N. Y. 671; *Brantler v. Marshall*, 1 Caines, 394; *Burbank v. Wyckoff*, 67 N. Y. 130, 133; *S. V. F. O. Asylum v. City of Troy*, 76 id. 108, 114; *Pope v. Hammer*, 74 id. 240, 245; Code Civ. Pro. §§ 369, 371; *Hoppough v. Struble*, 60 N. Y. 430, 433; *French v. Carhart*, 1 id. 96; *Yates v. De Bogert*, 56 id. 527, 532; *Flora v. Carbeau*, 38 id. 111; *Abeel v. Von Gelder*, 36 id. 513; *Wicklow v. Lane*, 37 Barb. 247, 249; *Becker v. Van Valkenburgh*, 29 id. 322; *Jackson v. Andrews*, 7 Wend. 157, 158; *C. L. N. Co. v. K. N. Co.*, 37 Hun, 9, 12; 108 N. Y. 631; *Hasbrouck v. Burhans*, 42 Hun. 376, 380; *Uline v. N. Y. C. & H. R. R. Co.*, 101 N. Y. 98, 111, 119; *Everingham v. Vanderbilt*, 12 Hun, 75; *Dresser v. Jennings*, 3 Abb. Pr. 240; *Bradt v. Church*, 110 N. Y. 537; *Gorham v. Innis*, 105 id. 87.) No error was made in the rulings of the trial judge on the admission of evidence. (*Hebberd v. Haughian*, 70 N. Y. 54, 59; *Murdock v. Gilchrist*, 52 id. 242, 247; *Tiemeyer v. Turnquest*, 85 id. 516, 523; *Quimby v. Strauss*, 90 id. 664; 1 Greenl. on Ev. § 277; *Coleman*

Statement of case.

v. *Man. B. I. Co.*, 94 N. Y. 229
Storms, 97 N. Y. 364; *Quinn v. Lloy*
Miller v. Montgomery, 78 id. 282, 286
 82 id. 339, 347; *Platner v. Platner*,
Campbell, 79 id. 625; *Blumenthal v.*
 Y. 558, 561; *Lewis v. Merritt*, 98
Havens, 101 id. 427, 433; *Ham v. V*
 271; *Sandford v. Ellithorpe*, 95 id. 52
 104 id. 163.) Plaintiff's motion to amer
 (Code Civ. Pro. § 723; *Price v. B*
Harris v. Tumbidge, 83 id. 92, 97)
 judgment by the General Term upon q
 have been erroneous. (*Cox v. James*,
Perrine v. Hotchkiss, 2 T. & C. 370,
Cornish v. Graff, 36 Hun, 160, 162;
 39 id. 193, 195; *Reese v. Boese*, 94 id. 6
 107 id. 531; *Genet v. City of Brooklyn*
Baird v. Mayor, etc., 96 N. Y. 567; *L*
 70, 73; *Porter v. Smith*, 107 id. 531.)

Theodore Fitch for David Hawley and
 Neither Farrington Hall, erected in 185
 ing, erected on the same foundation is
 encroached on the land conveyed by the
 of Yonkers. The findings of the court
 effect that those buildings did so encro
 which the General Term judgment of
 (*Mann v. Taylor*, 4 Jones [N. C.], 272;
 5 id. 322; *Massey v. Billisle*, 2 Iredell,
 principle that less material and doubt
 description of a deed must be subordinat
 certain and material in giving effect to
 parties, and that monuments control di
Olcott, 101 N. Y. 155; *Brockman v. E*
 3 Washb. on Real Property, 403; *Jacks*
 217; *Buffalo, N. Y. & E. R. R. Co.*
 348; *Robinson v. Kinne*, 70 id. 154.) I

Statement of case.

in his claims of an encroachment it would not constitute a breach of the condition of his deed to the town of Yonkers. (*In re Tilden*, 98 N. Y. 434, 443; *McGriffin v. Cohoes*, 74 id. 387; *Hoffman v. Aetna Ins. Co.*, 32 id. 412; *Coffin v. Reynolds*, 37 id. 640; *Patten v. N. Y. & E. R. R. Co.*, 3 Abb. [N. C.] 313, 314; 3 Washb. on Real Prop. 6; *McKelway v. Seymour*, 5 Dutch. 322; 2 Wash. on Real Prop. [4th ed.] 8; *Blackstone Bank v. Davis*, 21 Pick. 42; Tudor's L. C. on Real Property, 860; *Brandon v. Robinson*, 18 Ves. 429; *Craig v. Wells*, 11 N. Y. 32; *Hill v. Priestly*, 52 id. 635; *Abbott v. Curran*, 98 id. 665; *Lyon v. Hersey*, 103 id. 264; *Vail v. L. I. R. R. Co.*, 106 id. 283; *Duryea v. Mayor, etc.*, 96 id. 477; *Bennett v. Culver*, 97 id. 250, 296; 1 R. S. 699, § 2.) The city of Yonkers cannot be said to have "permitted" the alleged encroachment within the meaning of the clause of the deed in question. (*Duryea v. Mayor, etc.*, 96 N. Y. 477; *St. Vincent's Hospital v. City of Troy*, 76 N. Y. 109.) The acts and omissions of the plaintiff constituted an acquiescence and waiver which amount to an estoppel of his alleged claim, and the finding of the court at the trial, that any forfeiture wrought had not been waived, was erroneous. (*Ludlow v. N. Y. & H. R. R. Co.*, 12 Barb. 440; *Cook v. St. Paul's Church*, 67 N. Y. 594; *Willard v. Henry*, 2 N. H. 120; 69 N. Y. 594; 2 Wash. on Real Prop. 12.) Plaintiffs rights accruing from a breach of the condition were absolutely barred by the Statute of Limitation, and the refusal of the court to find defendants' requests to that effect was error. (Code Civ. Pro. §§ 365, 367; Malone on Real Prop. 259; Wood on Lim. 354; Code, §§ 369-372, 415; *Foster v. H. E. Co.*, 9 Barb. 287; 3 Wash. on Real Prop. 144; Wood on Lim. 509; *Bradstreet v. Huntington*, 5 Pet. 402; *Porguarel v. Smith*, 6 Pick. 172; Angell on Lim. § 263; *Duryea v. Shafer*, 55 N. Y. 446; *Jackson v. Woodruff*, 1 Cow. 286; *Crary v. Goodman*, 22 N. Y. 175; *Bliss v. Johnson*, 94 id. 235; *Driggs v. Phillips*, 103 id. 77.) It was error for the trial court not to grant defendants' motion to dismiss the complaint, as it united in the same action different rights and causes of action

Statement of case.

which could not properly be joined. (Code Civ. Pro. § 484; *Leroy v. Shaw*, 2 Duer, 626.) It was contrary to the statute to enter any judgment herein except for a dismissal of the complaint in favor of the defendant. (Code Civ. Pro. § 1518.) The findings of the court at Special Term, that the deed from Farrington to Radford, or the deed from Radford to Hawley, did not convey all the land formerly covered by Farrington Hall, or now covered by the Radford building, was untirely untenable. (3 Wash. on Real Prop. [4th ed.] 380. The court erred on the trial in permitting the plaintiff to give evidence in his own behalf as to a personal communication between witness and Farrington and Radford, from whom the defendant Hawley derives his title, and both of whom are dead. (Code. § 829; *Pope v. Allen*, 90 N. Y. 298.)

Joseph F. Daly for the city of Yonkers, respondent. Monuments always control courses and distances, because grants are supposed to be made with reference to an actual view of the premises. (*Wendell v. People*, 8 Wend. 183; *Jackson v. Freer*, 17 John. 29; *Martin v. Olcott*, 101 N. Y. 152; 3 Washb. on Real Prop. 407.) The sidewalks and areas are not breaches of the condition contained in the deed from plaintiff to the town of Yonkers. (3 Kent's Com. 432; *Lahr v. M. E. R. R. Co.*, 104 N. Y. 268, 292.) Plaintiff's remedy is barred by the Statute of Limitations. (*Tyler v. Heidorn*, 46 Barb. 439, 454; *Jackson v. Schoonmaker*, 4 Johns. 390, 399; *Jackson v. Cairns*, 20 id. 301, 306; *Grim v. Dyar*, 3 Duer, 354, 359; *Rowan v. Kelsey*, 18 Barb. 484, 488; *Randall v. Raab*, 2 Abb. Pr. 307, 313; Angell on Lim. § 369; *Driggs v. Phillips*, 103 N. Y. 77; *S. V. O. Asylum v. City of Troy*, 76 id. 114.) The Special Term erred in refusing to find "that the city of Yonkers never gave permission to the defendant Hawley, or to his grantors, or any other person, to erect upon the premises described in the deed of Rose to the town of Yonkers, any house, building, or erection of any kind whatsoever." (*Requa v. City of Rochester*, 45 N. Y. 129; *Hume v. Mayor, etc.*, 74 id. 276; *Todd v. City of Troy*, 61

Opinion of the Court, per BRADLEY, J.

id. 509; *Hart v. Brooklyn*, 36 Barb. 229.) Neither the town, village or city of Yonkers, nor the authorities of either of them, could, by any act or omission of theirs, give permission to obstruct the public highway, nor could any omission, or even express act, work a forfeiture of the land in question. (1 R. S. 337; *People v. Kerr*, 27 N. Y. 188; *S. V. O. Asylum v. Troy*, 76 id. 109; *Milhau v. Sharp*, 27 id. 611; *People v. Kerr*, 27 id. 188; 2 Dillon on Mun. Corp. 660.) The property being held by the city of Yonkers, not as proprietor of the land, but only in trust, for the use of the inhabitants in Yonkers and elsewhere, as a highway, the plaintiff cannot maintain an action for ejectment against the city of Yonkers, even if the court should find as a matter of fact that the condition contained in the deed was violated. (2 Dillon on Mun. Corp. 650, 653, 655, 664; *Child v. Chappell*, 9 N. Y. 246; *Conenhoven v. Brooklyn*, 38 Barb. 9; *Strong v. City of Brooklyn*, 68 N. Y. 1.)

Gratz Nathan for William Radford, respondent. Radford acquired title to the property in question by the deed given to him by the sheriff. (*Nicoll v. N. Y. & E. R. R. Co.*, 12 N. Y. 121; *Towle v. Remsen*, 70 id. 303; *Payne v. Beal*, 4 Denio, 405; *Springatun v. Schermerhorn*, 12 Johns. 361; *Sheridan v. House*, 4 Abb. Ct. App. Dec. 218; *Smith v. Scholtz*, 68 N. Y. 41.)

BRADLEY, J. The nature and purpose of the conveyance by the plaintiff to the town of Yonkers were to devote the premises to the use of the public for a highway. In accepting the deed, the town assumed the duty of observing the trust. This duty was due to the public for whose benefit the conveyance was made, which, in practical effect, dedicated to it the easement protected by title in the town and guarded by the terms of the grant. The then unincorporated village was afterward incorporated (Laws of 1855, chap. 331), and later as a city (Laws of 1872, chap. 866), and vested in it were all rights of property, real and personal, of the village

Opinion of the Court, per BRADLEY, J.

or town of Yonkers. (Id. tit. II, § 2.) The city thereupon assumed the same relation to the plaintiff's conveyance that the town took by it. When the deed was accepted by the town the granted land became a highway, and the grantee could not, nor could its successor, lawfully appropriate it to any other purpose. They respectively held it in trust for such use. The power thus qualified arose from the restriction in the deed. And the effect is the same in that respect, whether such restriction be treated as a covenant or condition subsequent. The latter is not favored in law, and to support it as such it must, by the terms used and the apparent circumstances, clearly appear to have been so intended by the parties. (4 Kent's Com. 129; *Craig v. Wells*, 11 N. Y. 315; *Post v. Weil*, 115 id. 361.) There is no reason why a grantor in a conveyance of property for a specific public use, may not subject the title to liability to forfeiture for breach of a condition expressed in the deed. He has in the deed in question used apt words to express such right. It must, therefore, we think, have been the intent of the plaintiff to convey the title to the premises subject to be defeated by breach of the condition subsequent, if he elected in such event to exercise his right of forfeiture. He seeks to do so, and the question arises whether his action has the support of breach of the condition. At the time of the conveyance the premises in question were bounded on the north by a brick store erected by the plaintiff the year before, extending from the then New York and Albany Post road, now Broadway, west about fifty feet, and from its rear by a wall on the same line for some distance further. The plaintiff conveyed that store property to one Barry by deed bearing even date with that to the town, and afterward it was conveyed to one Farrington, who, in 1857, took down the store and erected upon that lot and land north of it, belonging to him, a building known as Farrington Hall. This building stood until in January, 1866, when it was burned down, except the north wall, and another one erected on the same ground by William Radford who had become the owner of it. This was known as Radford Hall.

Opinion of the Court, per BRADLEY, J.

The defendant Hawley afterward became the owner of the property.

The trial court found that the Radford hall encroached upon the premises conveyed to the town of Yonkers at the west end on Broadway one foot and thirty-seven-one-hundredths of a foot, and on the east end two inches. The length of that side of the building is sixty-four feet. The court also found that an area on the south side of the building further encroached upon the premises in question, in which is a stone stairway leading below, and that the south wall of the area is one and one-third foot thick, eight feet high and sixty-four feet long; that around the area-way and about six feet from the south boundary of the building, from November, 1864, to January, 1882, an erection above the surface of the ground enclosed the area-way, and over it were gratings and a cellar-door, which when open was an obstruction. This area is below the surface of the ground, about eight feet deep and is four feet wide from the building to the wall, which is also substantially below the surface of the street; the gratings are flush with the walk, also the cellar-door when closed. And over the area is a regular sidewalk for footmen, for which purpose it is used. It is not inconveniently above the surface of the street for a sidewalk, nor does it appear that the door over the stairway below has, by being open, been any obstruction to the use of the sidewalk. That this area occupies land conveyed by the plaintiff to the town is not questioned. The requirement by the deed is that this land "shall forever hereafter be and remain public and open as a public highway, and that no house, building or other erection whatever except a public monument shall be built or erected or permitted upon" it. This is to have a reasonable construction and will not be extended by inference. The purpose of it appears to have been to preserve the use of the premises for a highway or a public street, and anything erected upon them inconsistent with that use, would violate the apparent design. But it cannot be assumed that what is usually or commonly permitted or required in streets of villages or cities, came within the prohibitory provision of the deed. It would

Opinion of the Court, per BRADLEY, J.

not be reasonable to give it the effect to deny the erection of lamp-posts above, and the construction of sewers and the laying of water-pipes beneath the surface. Sidewalks are essentially within and part of a street or highway in villages and cities, and constitute one of its legitimate uses for the purpose of travel upon the street. The maintenance of the sidewalk is clearly no breach of the condition. It is, however, urged that the outer wall of the area is an erection upon the land in contravention of the provision of the deed. It is below the surface, and the sidewalk rests upon it. So far as relates to the support of the walk, it is not important whether it be eight feet or one foot in height from its base. It is true that the area was made to supply light to the basement of the building by means of the gratings in the walk, and thus it results beneficially to the occupant, but that does not render it, nor is it necessarily inconsistent for that reason with the use of the walk as part of the street. It was in view of the public convenience in the use of the premises as a street or highway, and to guard those rights in that respect that it must be assumed the condition was inserted in the conveyance. And any other use not inconsistent with such purpose, nor within the terms of the inhibition, is not necessarily denied to the grantee by it. (2 Wash. on Real Prop. 6; *Langdon v. Middagh*, 2 Alb. L. J. 70; *Broadway v. State*, 8 Blackf. 290; *Southard v. Central R. R. Co.*, 26 N. J. L. 13; *McKelway v. Seymour*, 29 id. 321.) The ground upon which may be defeated the title of a grantee, and which will support a claim for forfeiture as for breach of condition subsequent, must be substantial and clearly established. (*Chapin v. School Dist.*, 35 N. H. 445; *Hadley v. Hadley Mfg. Co.*, 4 Gray, 140.)

The construction of the wall of the area was not, nor was the area an erection upon the land within the meaning of the condition. Nor was it rendered so by the use of it. When the Farrington hall was erected in 1857, the area was first constructed. The streets there were then under the control of the constituted authorities of the village of Yonkers, as they also were when the hall was reconstructed by Radford in

Opinion of the Court, per BRADLEY, J.

1866. It may be assumed that this area was there with the permission or consent of the village. It is not uncommon when the legal title is held in trust for the public use, for municipal permission to be given to make like areas in streets of villages and cities adjacent to buildings where are needed sidewalks by which the areas are covered, and thus form no inconvenience or interruption to use by the public. The village and city of Yonkers were chargeable with notice of the condition in the plaintiff's deed, through which the public acquired the right to use this land as a street. And while it may be assumed that the municipal authorities were advised that this area extended into the land so conveyed, it is difficult to assume that they had notice that the halls erected in 1857 and 1866 encroached upon the land in question. The fact appears by the evidence, and was found by the court, that the Radford hall was erected on the same foundation as the Farrington hall. The question whether their south wall was to any extent south of the line, was a closely contested one by conflicting evidence. One witness who had lived there fifty years, a civil engineer, surveyor and architect, who made, early and later, many surveys there, testified that the south wall of the two halls was located in the same place as was the south wall of the plaintiff's store at the time of his conveyance to the town; that he was the architect who made the plan and specifications for the Farrington hall; that it was erected accordingly, and that the south wall was no further south than that of the plaintiff's store, which had been taken down for the purpose of erecting the hall on that and land adjoining on the north of it. And the party who had charge of the work of erecting that building testified that he did it according to the lines furnished him by the architect. It appears that before the brick store referred to, which the plaintiff had owned, was torn down, the north wall of a store further north was, to make it a party-wall, increased in thickness from eight to twelve inches, making the center line of the old wall the center line of the party-wall, which became the north wall of the Farrington hall. It continued to stand, and was made and still remains the north

Opinion of the Court, per BRADLEY, J.

wall of the Radford hall. The surveyor, before referred to, also testified that before the Rose store was torn down, and both before and after this north wall was increased in thickness, he made measurements from it to the south side of the Rose store; that prior to that increased thickness of the wall, the distance from its north side, south to the south side of the Rose store on the Broadway end, was forty-seven feet and two inches, and after it was made a party-wall the distance was two inches more. And that he has, since the erection of the Radford hall, made the measurement, and the distance is forty-seven feet four inches, the same as it was from the same point at the party-wall to the south side of the Rose store, or what is the same thing, the north line of the land in question. On the other hand, two civil engineers and surveyors appear to have made measurements from other points, having reference to descriptions in deeds, and the location of monuments in that locality, to the north-west corner and the north line as thus ascertained of the premises in question, and the result, to which they testify, is that the Radford hall encroaches at west end on Broadway about sixteen inches, and at the east end at or near Academy street, now Palisade avenue, two inches. This conflicting evidence is referred to in support of the suggestion before made, to the effect that it was not apparent that the village and city authorities had notice of the alleged encroachment; and that there was opportunity for much doubt upon the subject, further appears by the diverse views of the trial court and the General Term of the fact in that respect, as represented by the evidence; while the former found the fact with the plaintiff, the view of the General Term was that the weight of evidence was decidedly the other way.

The court made no finding on the question of knowledge or notice of the village or city of any encroachment of the building, and refused to find that the town, village or city never gave permission to the defendant Hawley or his grantors, or any other person, to erect upon the premises any building or other erection; and exception was taken to such refusal. Motion was made to dismiss the complaint on that and the

Opinion of the Court, per BRADLEY, J.

further ground that neither the town, village or city of Yonkers was responsible for the encroachment, assuming it to be such, of the hall on the small portion of the land in question; and that it did not appear that either had any knowledge of such encroachment. Exception was taken to denial of the motion.

The deed is entitled to such construction as will carry into effect the intent of the parties so far as such intent can be collected from the whole instrument. (1 R. S., 748, § 2.) It evidently was designed that the reserved right of forfeiture should be dependent upon violation of the condition by the grantee or its successor charged with the trust, and for the purpose of preserving the rights of the parties the provisions of the deed must have a reasonable construction and effect. To justify the assertion of breach of the condition and thereby defeat the title, the violation of it must in some sense be permitted by the municipality. (*Indian Orchard Coal Co. v. Sikes*, 8 Gray, 562.) If a trespasser should suddenly place an erection on the premises before the city had a reasonable opportunity to prevent or remove it, the act would not constitute a breach, although its permitted continuance might. The duty imposed upon the municipal authorities was that of diligence to protect the premises for the declared public use, and against the prohibited invasion, and they were required to observe that of which reasonable diligence would advise them in that respect. The conclusion was not warranted by the evidence that the village or city had any notice that the Far-ington hall or the Radford hall encroached to any extent upon the premises, which constituted part of the highway under its control, nor can it be said in view of what appears by the evidence that reasonable diligence on their part would have led to the information that it did. It was at least a very doubtful question of fact, and one which the municipal authorities, upon the conflicting information, if they had sought it from all the sources from which the evidence on the trial was derived, may reasonably have felt justified in not resorting to the courts for determination. It was at most a matter of much uncertainty, and so much so upon the evidence that no

Opinion of the Court, per BRADLEY, J.

one could tell what the result would be until announced. The municipal authorities were not chargeable with notice that the hall building extended south of the line of the old store lot, and, therefore, cannot be said to have permitted any encroachment of it upon the premises conveyed by the plaintiff to the town. This is put upon the ground that by the exercise of the diligence required of them, they would not, with any reasonable degree of certainty, have been able to ascertain or determine that there was any encroachment.

The matter was a controversy about the location of the line between the land in question and that lying north of it, with a difference in the dispute of sixteen inches at one end, tapering down to two inches at the other. This was a small strip. And it would hardly seem that the question whether or not there was an effectual breach of the condition was dependent upon the determination of that controversy. We think the evidence did not warrant the conclusion of any substantial breach of the condition; that the court erred in refusing so to find as requested; and that the complaint should have been dismissed upon the grounds before mentioned, especially on the motion made at the close of the evidence.

It cannot be held as matter of law that the plaintiff waived his right to assert by action the alleged breach. He says that he observed when the Farrington hall was being erected in 1857, about twenty-nine years before the commencement of this action, that the south wall encroached upon the premises; that he knew when Radford was proceeding to erect his hall in 1866, more than twenty years before he brought this action, that its wall in like manner encroached, and that he protested. He was a trustee of the village in 1864 and 1865. He never called the attention of the board of trustees to the matter. If that had been done the village may have disposed of it during the life-time of the successive proprietors of the halls who erected them, perhaps with less difficulty than attended the litigation thirty years after. If it had appeared to the village that an encroachment was being made it would have been within its power and line of duty to stay it or cause its removal

Statement of case.

by action, if necessary. Whatever consideration this lapse of time before the assertion of any claim of breach of condition may, in view of the circumstances, have permitted upon the question of fact, no question of law is raised upon it by the exception taken.

The view taken renders it unnecessary to give any consideration to the question of the statute of limitations.

The order should be affirmed and judgment absolute directed for the defendants.

All concur.

Order affirmed and judgment accordingly.

CHARLOTTE M. SMITH, Respondent, v. THE AGRICULTURAL
INSURANCE COMPANY, Appellant.

A policy of fire insurance, upon a barn and contents, contained a condition that in case of any incumbrances upon the property they must be represented to the company in the application, otherwise the policy would be void; it also provided that all statements contained in the application should be warranties on the part of the assured. The application which was made by the authorized agent of the insured, contained a question as to the amount of incumbrances. The answer was "\$1,000." It appeared that the premises, upon which were the buildings insured, were at the of the application incumbered by mortgages to the amount of over \$5,000. Said agent testified that the application was not read to him, and he did not read it; that defendant's agent, who filled it out, asked him if the premises were incumbered \$1,000 and he answered that there was over \$2,000 incumbrances on them. Defendant's agent testified that the agent of the insured stated the premises were incumbered for \$1,000 and he so wrote his answer in the application. The court instructed the jury that if they believed the testimony of defendant's agent, plaintiff could not recover, but if he was told that the incumbrance was over \$2,000 the discrepancy between such statement and the amount of the incumbrances was not a defense to the action. *Held*, error; that the discrepancy amounted to a material misrepresentation.

Plaintiff claimed that the contract of insurance was severable, and a misstatement in respect to the amount the realty was incumbered did not invalidate the insurance on the personalty. *Held*, untenable.

(Argued January 22, 1890; decided February 25, 1890.)

Statement of case.

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made the first Tuesday of January, 1887, which affirmed a judgment in favor of plaintiff entered upon a verdict, and affirmed an order denying a motion for a new trial.

Since September 3, 1877, Elton M. Smith has owned a farm of fifty acres in the town of Galen, in this state, upon which there is a farm-house and out-buildings. The defendant insured one of the barns for \$600, and its contents for \$500, against any damage, not exceeding the sums specified, that should be caused by fire between October 6, 1881, and October 6, 1884.

On the first day of April, 1882, the barn and its contents were destroyed by fire, and this action was brought on the policy by the assignee of the insured, to recover the damages which are alleged to be \$600 by the loss of the barn, and \$359.15 by the loss of the contents; total, \$959.15. The jury found for the plaintiff on the issues submitted, and assessed the damages at the amount claimed, and added \$129.85 for interest, making the total amount of the verdict \$1,089.

Further facts appear in the opinion.

A. H. Sawyer for appellant. The motion for a non-suit at the close of the plaintiff's case, and upon the close of the proofs, should have been granted upon the ground that at the time of the issuing and delivery of the policy of insurance by the defendant to Elton M. Smith, his interest in the property insured was not the entire, unconditional and sole ownership of the same for the use and benefit of the assured. (*Lasher v. S. J. F. & M. Ins. Co.*, 86 N. Y. 423; 18 Hun, 98; *Rohrback v. G. Ins. Co.*, 62 N. Y. 47.) The motion for non-suit should have been granted upon the ground that the premium not having been paid before the fire, the policy had ceased to be operative. (*Wall v. H. Ins. Co.*, 36 N. Y. 157; *Klein v. Ins. Co.*, 104 U. S. 88; *Thompson v. Ins. Co.*, Id. 252; *Wheeler v. C. L. Ins. Co.*, 82 N. Y. 543, 550; *Roehner v. K. Ins. Co.*, 63 id. 160; *Clausen v. Russell*,

Statement of case.

18 Wkly. Dig. 10; *Att'y Gen'l v. Ins. Co.*, 82 N. Y. 173, 190; *Holly v. M. Ins. Co.*, 105 id. 437, 444; *May on Ins.* § 341; *Baker v. U. M. L. Ins. Co.*, 43 N. Y. 283, 287; *Howe v. U. M. L. Ins. Co.*, 80 id. 32; *Cohen v. C. F. Ins. Co.*, 67 Tex. 325.) Weed, the solicitor or agent of the company, was authorized only to receive applications for insurance and collect and transmit the premiums, and had no authority to issue policies or to extend the time for the payment of the premium beyond the time fixed by the policy. (*Crichtett v. A. Ins. Co.*, 36 Am. R. 230; 53 Ia. 404; 22 Alb. L. J. 137; *Hutchins v. Munger*, 41 N. Y. 158.) The admission of the receipt for the premium upon the policy in suit under defendant's objection and exception was error. (*Robertson v. M. L. Ins. Co.*, 88 N. Y. 541, 545; *Bennecke v. C. Ins. Co.*, 105 U. S. 355, 359; *Harle v. C. B. Ins. Co.*, 71 Ia. 401; 32 N. W. Rep. 396; *Robinson v. C. Ins. Co.*, 43 id. 647; *McMartin v. C. Ins. Co.* 42 id. 934; *F. C. Ins. Co. v. School Directors*, 4 Ill. App. 145; *Garlick v. N. V. Ins. Co.*, 44 Ia. 553; 3 L. & E. Rep. 498.) The evidence offered by the plaintiff to show that the witness had procured policies of the defendant prior to the issuing of the policy in suit, through other and different agents of the company, upon which credit was extended to him for the premiums, which were subsequently paid by him during the life of the policy, was incompetent. (*Wood v. P. Ins. Co.*, 32 N. Y. 619, 623.) A payment of premium upon an insurance policy made by a third person without the knowledge or consent of the assured, even though made with his money, would not bind him or the company, and if made with his money the amount so wrongfully appropriated could be recovered back by him. (*Whiting v. M. M. L. Ins. Co.*, 129 Mass. 240.) The policy of insurance was void at the time of the fire by reason of the incumbrances upon the property covered by the policy, and not disclosed to the company or its agent. (*Eagen v. M. Ins. Co.*, 5 Denio, 326; *Merrill v. A. Ins. Co.*, 73 N. Y. 452, 466; *Gould v. H. P. Ins. Co.*, 16 Hun, 538; *Sentell v. O. C. F. Ins. Co.*, 16 id. 516; *McNierney v. A. Ins. Co.*, 48 id. 239; *Hayward v. N. E. F. Ins. Co.*, 10 Cush.

Statement of case.

444; *Brown v. P. Ins. Co.*, 11 id. 280; *B. Ins. Co. v. Winslow*, 8 Gray, 38; *Falis v. C. Ins. Co.*, 7 Allen, 46; *Towne v. F. Ins. Co.*, 7 id. 51; *Van Buren v. S. J. Ins. Co.*, 28 Mich. 398.) The statement in the application upon which the policy of insurance in question was issued, that the property was incumbered \$1,000, is a warranty that the property was not incumbered to an amount exceeding \$1,000. (*Sentell v. O. C. F. Ins. Co.*, 16 Hun, 516; *B. Ins. Co. v. Winslow*, 8 Gray, 38; *Falis v. C. Ins. Co.*, 7 Allen, 46; *Towne v. F. Ins. Co.*, Id. 51; May on Ins. § 156; Angel on Ins. §§ 140, 141; *Ripley v. E. Ins. Co.*, 39 N. Y. 136, 163; *Bryce v. L. Ins. Co.*, 55 id. 244; *Rohrback v. G. Ins. Co.*, 62 id. 62; *Duncan v. S. Ins. Co.*, 6 Wend. 488; *Wood v. H. F. Ins. Co.*, 13 Conn. 533; *Bennett v. A. Ins. Co.*, 50 id. 420; *Barteau v. P. Ins. Co.*, 67 N. Y. 595.) Under the condition in the application signed by Smith, that no statement made or information given by the assured prior to the issuing of the policy shall be deemed to be made to the company, unless reduced to writing and incorporated in the application, this evidence of Smith was clearly immaterial and incompetent, and the charge of the court was error. (*Chase v. H. Ins. Co.*, 20 N. Y. 52; *Rohrback v. G. Ins. Co.*, 62 N. Y. 63; *Alexander v. G. Ins. Co.*, 66 id. 467; *Barteau v. P. Ins. Co.*, 67 id. 595; *N. Y. L. Ins. Co. v. Fletcher*, 117 U. S. 519, 528; *Pollock v. Pollock*, 71 N. Y. 137, 140; *Murray v. Harway*, 56 id. 346; *Mason v. Lord*, 40 id. 477.) The trial court erred in its charge to the jury that if Smith stated at the time he made the application that the incumbrance was over \$2,000, then the plaintiff was entitled to recover in this action, so far as that question was concerned. (*Hayward v. N. E. Ins. Co.*, 10 Cush. 444; *Brown v. People's Ins. Co.*, 11 id. 280; *Sentell v. O. F. Ins. Co.*, 16 Hun, 516.) The statement in the application that the amount of incumbrances upon the property was \$1,000 is binding and conclusive upon the assured, and the evidence offered and received upon the trial, under the defendant's objection and exception, that any other or different statement in relation to the incumbrances was made, was immaterial and

Opinion of the Court, per FOLLETT, Ch. J.

incompetent, and this judgment must be reversed for the error of the court in admitting such evidence. (*Rohrbach v. G. Ins. Co.*, 62 N. Y. 47; *Alexander v. G. Ins. Co.*, 66 id. 464; *Kabok v. P. Ins. Co.*, 4 N. Y. Supp. 718; *Grace v. A. C. Ins. Co.*, 109 U. S. 278.) Under the condition of the policy rendering the same void, if the property is incumbered without notice to the company, the contract is not severable, and the incumbrances upon the real property not being truly represented to the company rendered the policy void, both as to the real and personal property mentioned therein. (*Merrill v. A. Ins. Co.*, 73 N. Y. 452; *McNierney v. A. Ins. Co.*, 48 Hun, 239.)

DeL. Stow for respondent. The case at bar is one where the assured made a true statement, which was incorrectly or fraudulently reduced to writing by the authorized agent of the company. (*Bennett v. A. Ins. Co.*, 106 N. Y. 243-49; *Grattan v. M. L. Ins. Co.*, 92 id. 274; *Flynn v. E. L. Ins. Co.*, 78 id. 568; *Chase v. H. Ins. Co.*, 20 id. 52.) The fraud or mistake being thus established, there can be no question as to the right on the part of the plaintiff to have this portion of the application reformed so as to make it state correctly the answer of the assured, as same was found to have been made to the agent of defendant. (*Grattan v. M. L. Ins. Co.*, 80 N. Y. 281-294; *Arthur v. H. F. Ins. Co.*, 78 id. 462; *Grattan v. M. L. Ins. Co.*, 92 N. Y. 274, 282-286.) The repeated attempts on the part of Weed to collect the premium was a waiver. (*Robinson v. P. F. Ins. Co.*, 18 Hun, 395; *Pechner v. P. Ins. Co.*, 65 N. Y. 195; *Bowman v. A. Ins. Co.*, 59 id. 521.) There is no proof of an incumbrance upon the personal property, or of a warrant of title thereto by the assured. (*Holmes v. Drew*, 16 Hun, 491.) The motion for new trial was properly denied, as the appellant did not sufficiently point out the supposed grounds of error. (*Cooke v. Leonard*, 17 Wkly. Dig. 575.)

FOLLETT, Ch. J. This action was defended on the ground, among others, that the following conditions in the policy were violated by the insured :

Opinion of the Court, per FOLLETT, Ch. J.

(1) "If the property, either real or personal, or any part thereof, shall be incumbered by mortgage, judgment or otherwise, it must be so represented to the company in the application, otherwise this entire policy and every part thereof shall be void."

(2) "This policy of insurance is based upon a written application on file in the company's office, purporting to be signed by the applicant, or by his authority, and all statements contained therein are warranties on the part of the assured."

The application on which the policy was issued was signed by the duly authorized agent of the insured, and contains this question and answer:

"Q. How much is the real estate incumbered? A. \$1,000."

When the policy was issued, and when the loss occurred, there were five mortgages on the fifty acres, the principal sums of which aggregated \$4,411.14, with arrears of interest amounting to more than \$600, so that the premises were incumbered for upward of \$5,000, and in addition, there was a mortgage upon six acres adjoining the fifty acres, of \$500, with interest from July 1, 1887.

Since 1880, Elton M. Smith, the insured, has not resided in this state, and Elijah Smith, his father, has occupied the property and acted as the agent of his son in respect to this insurance. Since some time before the date of the policy, Abram Weed has been an agent of the defendant, with powers defined by the following clause in the application: "The powers of the agents of this company are limited to receiving proposals for insurance and collecting premiums, and giving the assent of the company to assignments of policies." The oral negotiations, which resulted in the execution and delivery of the application on which the policy was issued, were conducted by Elijah Smith in behalf of the insured, and Abram Weed in behalf of the defendant. Elijah Smith testified: "Q. What was said (between you and Weed) on the subject of incumbrances? A. He asked if there was a \$1,000 incumbrance, and I told him there was over \$2,000 incumbrance on it. Q. Did you tell him there was \$1,000 incumbrance on it? A.

Opinion of the Court, per FOLLETT, Ch. J.

No sir; the application was not read to me, and I did not read it; that representation that there was only \$1,000 incumbrance, was not true; I signed it not knowing that that was there."

Abram Weed testified that Elijah Smith stated that the place was incumbered for \$1,000, and that he did not say it was incumbered for over \$2,000.

The court instructed the jury that if Elijah Smith stated to Abram Weed that the place was incumbered for \$1,000, the plaintiff could not recover. But if Smith told Weed the place was incumbered for over \$2,000, that the discrepancy between such statement and the amount of the incumbrances, was not a defense to the action. To this instruction the defendant excepted, and asked the court to instruct the jury that if they found that Smith stated to Weed that the property was incumbered for over \$2,000, the plaintiff could not recover, which was refused, and an exception taken. This question was also raised by a motion to non-suit.

The most favorable view which can be taken by the court for the plaintiff, is to consider the case as though the question and answer testified to by Smith had been inserted in the application, instead of the question and answer appearing therein.

Assuming, then, that the conversation between the agents of the contracting parties about incumbrances was precisely as testified to by the insured's agent, there was a material misrepresentation in respect to the amount of the liens. The answer that the place was incumbered "for over \$2,000," to the question: "Is there a \$1,000 incumbrance on it?" did not actually or proximately disclose the fact inquired about. The answer, "over \$2,000," cannot by any fair construction be held to be notice to the defendant, or its agent, that the place was then incumbered for over \$5,000. In *Hayward v. N. E. M. F. Ins. Co.* (10 Cush. 444), the question was: "Is the property incumbered; if so, how much? A. About \$3,000." The property was incumbered for \$4,000. The trial court held that this misstatement did not avoid the policy, but on appeal the judgment was reversed, the court saying:

"It seems to us quite too clear to admit of a doubt that the answer given by the plaintiff in his application to the inquiry respecting incumbrances was materially false. Making all due allowances for the loose manner in which such documents are often prepared, and giving the plaintiff the full benefit of the word, 'about,' as qualifying and limiting his answer, it cannot in any view be deemed to be substantially true. To hold so wide a deviation from the fact to be immaterial, would be to defeat the very purpose which the questions and answers in the application were intended to accomplish, and render them but a vain and idle ceremony. We are, therefore, of the opinion that the representation, as to the amount of the incumbrance upon the property, was a material one which the plaintiff was bound to make substantially true, and that, having failed to do so, he cannot recover upon his policy." In *Brown v. People's M. Ins. Co.* (11 Cush. 280), the application contained the following question and answer: "Q. State whether or not incumbered, to whom and to what amount? A. Mortgaged for about \$4,000 to Gen. C. T. James." The property was mortgaged to James for \$3,600, and to one Perkins for \$1,100. The answer was held to be a material misstatement, which avoided the policy. In *Abbott v. Shawmut M. F. Ins. Co.* (3 Allen, 213), it was stated in the application that the insured property was mortgaged for \$6,600, but it was, in fact, mortgaged for \$6,684. It was held that this misstatement avoided the policy. In *Falis v. Conway M. F. Ins. Co.* (7 Allen, 46), the application contained this question and answer: "Q. Is it incumbered by mortgage or otherwise; if so, for what sum? A. Yes; \$1,000 with other property." It was in fact mortgaged for \$1,400. This was held a material misstatement, rendering the policy void. In *Jacobs v. Eagle M. F. Ins. Co.* (7 Allen, 132), the application contained the following question and answer: "Q. State whether incumbered, to whom and what amount? A. There are two mortgages, \$2,700 in all. First, of \$1,150; 2d mortgage \$1,550." The principal sums of the two mortgages were correctly stated, but there was \$300 accrued interest upon the

Opinion of the Court, per FOLLETT, Ch. J.

first mortgage. This was held to be a material misrepresentation which avoided the policy. In *Sentell v. Oswego Co. F. Ins. Co.* (16 Hun, 516), it was held that mortgaging the insured property for \$1,200 instead of for \$1,000, as permitted by the contract of insurance, avoided the policy.

It is urged by the respondent that this contract of insurance is severable. That the insurance on the barn should be deemed one contract, the insurance on its contents another contract, and that a misstatement, in respect to the amount for which the realty was incumbered, does not invalidate the insurance on the personalty, and that defendant, having asked the court to rule that no part of the loss could be recovered, asked for too much in the instruction prayed for and in its motion for a non-suit, and that the exceptions to these rulings are unavailable. Under forms of policies, quite different from the one in the case at bar, insuring specific amounts on separate items of property, contracts have been held severable. The following cases illustrate the rule. (*Merrill v. Agricultural Ins. Co.*, 73 N. Y. 452; *Herrman v. Adriatic F. Ins. Co.*, 85 id. 162; *Schuster v. Dutchess Co. Ins. Co.*, 102 id. 260; *Holmes v. Drew*, 16 Hun, 491; *Sunderlin v. Aetna Ins. Co.*, 18 id. 522; *Dacey v. Agricultural Ins. Co.*, 21 id. 83; *Woodward v. Republic F. Ins. Co.*, 32 id. 365; *Baldwin v. Hartford F. Ins. Co.*, 60 N. H. 422.)

It is expressly stipulated, in this policy, that if either the real or personal property, or any part of it, be incumbered, it must be so represented to the company in the application, otherwise the entire policy and every part of it shall be void.

This policy is quite different in its legal effect from those considered in the cases cited, it not being expressly provided in those policies, as in this, that a misrepresentation of the situation of one of the subjects insured should invalidate the insurance on all other property covered by the policy.

Regarding the application amended so as to conform to the testimony produced by the plaintiff, and then construing the application and policy together, as the parties have stipulated that we must, there was a breach by the insured of the terms

Statement of case.

of the contract of insurance, which defeats the plaintiff's claim to recover.

The judgment should be reversed and a new trial granted, with costs to abide the event.

All concur, except BROWN, J., dissenting; and BRADLEY and HAIGHT, JJ., not sitting.

Judgment reversed.

118	527
136	82

RICHARD MURPHY, Respondent, v. THE NEW YORK CENTRAL
AND HUDSON RIVER RAILROAD COMPANY, Appellant.

In an action to recover for injuries alleged to have been caused by defendant's negligence to plaintiff, a car repairer in the employ of the R. W. & O. R. R. Co., it appeared that plaintiff was at work between two cars standing on a side track, repairing the bumper of one of them, which was separated about six inches from the bumper of the other. He was supporting himself with one hand over the end of the bumper, when an unattended freight car, moved down on the track by D., an employe of defendant, who had charge of an engine engaged in making up a train, ran against the car in front of which plaintiff was at work, causing the bumpers to come together, and so crushing his arm. D. had called plaintiff's attention that morning to the car, and asked him to repair it, and before going to work plaintiff had posted his danger flag as required, in the proper place on the front car, so that it could be plainly seen. *Held*, that the question of defendant's negligence and of contributory negligence on plaintiff's part were properly submitted to the jury; that plaintiff's manner of working could not, under the circumstances be said to be negligence as a matter of law, as he had the right to suppose defendant's servants would discharge their duty and not disregard his signal flag.

Also, *held*, the fact the brakes of the two cars were not set or the cars properly secured as required by the rules of the company, did not, as matter of law, convict plaintiff of negligence, as, by the rules of the company, the duty to attend to this was not imposed upon him, but the station agent.

Reported below (51 Hun, 242).

(Argued January 21, 1890; decided February 25, 1890.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order

Statement of case.

made April 30, 1887, which affirmed a judgment in favor of plaintiff entered upon a verdict, and affirmed an order denying a motion for a new trial.

The nature of the action and the facts are sufficiently stated in the opinion.

C. D. Prescott for appellant. The injury was the result of plaintiff's own negligence, and he should not have recovered. (*Cordell v. N. Y. C. & H. R. R. Co.*, 75 N. Y. 330, 332; *Reynolds v. N. Y. C. & H. R. R. Co.*, 58 id. 248; *Gorton v. E. R. Co.*, 45 id. 664; *Warner v. N. Y. C. R. R. Co.*, 44 id. 465, 471; *Ernst v. H. R. R. R. Co.*, 39 id. 61, 68; *Wilds v. H. R. R. R. Co.*, 24 id. 430; *Stackus v. N. Y. C. & H. R. R. R. Co.*, 7 Hun, 559; *Spaulding v. Jarvis*, 32 id. 621; *Davenport v. B. C. R. R. Co.*, 100 N. Y. 632; *Adolph v. C. P. & N. & E. R. R. Co.*, 76 id. 530; *Salter v. U. & B. R. R. R. Co.*, 75 id. 273; *Sammon v. N. Y. & H. R. R. Co.* 62 id. 255; *Culhane v. N. Y. C. & H. R. R. R. Co.*, 60 id. 137; *McGrath v. N. Y. C. & H. R. R. R. Co.*, 59 id. 471-2; *Weber v. N. Y. C. & H. R. R. R. Co.*, 58 id. 455; *Davis v. N. Y. C. & H. R. R. R. Co.*, 47 id. 400; *Johnson v. H. R. R. R. Co.*, 20 id. 71; *Button v. H. R. R. R. Co.*, 18 id. 248; *Holbrook v. U. & S. R. R. Co.*, 12 id. 236; *Thompson v. N. Y. C. & H. R. R. R. Co.*, 33 Hun, 16.) The injury was the result of plaintiff's own act and carelessness, and he cannot recover for same. (*Gibson v. E. R. R. Co.*, 63 N. Y. 452; *DeGraff v. N. Y. C. & H. R. R. R. Co.*, 76 id. 125; *DeForest v. Jewett*, 88 id. 264; *Slater v. Jewett*, 85 id. 61; *Kennedy v. M. R. R. Co.*, 33 Hun, 457; 100 U. S. 213; *Warner v. E. R. Co.*, 39 N. Y. 468.) The accident was the result of negligence of the fellow-servants of plaintiff, and so plaintiff cannot recover. (3 Wood on Railway Law, 1501; *Slater v. Jewett*, 85 N. Y. 61; 39 Am. Rep. 627; *Ross v. N. Y. C. & H. R. R. R. Co.*, 74 N. Y. 617; *Harvey v. N. Y. C. & H. R. R. R. Co.*, 88 id. 481, 484; *Wright v. N. Y. C. & H. R. R. R. Co.*, 25 id. 562, 565; *King v. N. Y. C. & H. R. R. R. Co.*, 66 id. 181; *Burke v. De*

Statement of case.

Castro, 11 Hun, 354; *Olson v. Clyde*, 32 id. 425; *Warner v. E. R. Co.*, 39 N. Y. 468.) The defendant is not liable for plaintiff's injury. (*Sutton v. N. Y. C. & H. R. R. Co.*, 66 N. Y. 243; *Devlin v. Smith*, 89 id. 470; *Coyle v. Pierrepont*, 33 Hun, 312; *King v. N. Y. C. & H. R. R. Co.*, 66 N. Y. 181; *Burke v. DeCastro*, 11 Hun, 354; *Lowery v. B. C. & N. R. R. Co.*, 76 N. Y. 28; *Nicholson v. E. R. Co.*, 41 id. 525; *P. & R. Co. v. Hummell*, 44 Penn. St. 375; *Motze v. N. Y. C. & H. R. R. R. Co.*, 1 Hun, 417; *Harty v. N. J. C. R. R. Co.*, 42 N. Y. 468.)

McMahon & Curtin for respondent. The defendant, by its servants, in charge of engine 457, was guilty of culpable negligence in shifting the car from the cattle branch to the southerly branch, and driving it a distance of at least 339 feet, with no brakeman upon it to guide it and arrest its course. (*Weber v. R. R. Co.*, 58 N. Y. 451, 455; *Hart v. Bridge Co.*, 80 id. 622; *Payne v. R. R. Co.*, 83 id. 572-574; *Bernhard v. R. R. Co.*, 1 Abb. Ct. App. Dec. 131; *Canfield v. B. & O. R. R. Co.*, 93 id. 537; *Bills v. N. Y. C. R. R. Co.*, 84 id. 10; *McGrath v. N. Y. C. & H. R. R. R. Co.*, 63 id. 530; *Webb v. K. R. R. Co.*, 57 Me. 117; *Clement v. Caulfield*, 28 Vt. 302; *Michigan Central v. Kanuse*, 39 Ill. 272; *Parker v. Jervis*, 3 Abb. Ct. App. Dec. 449; *Besiegel v. R. R. Co.*, 40 N. Y. 9; *Rounds v. D., L. & W. R. R. Co.*, 5 T. & C. 480.) There was no contributory negligence on the part of plaintiff. (*Newson v. N. Y. C. R. R. Co.*, 29 N. Y. 307; *Roll v. N. C. R. R. Co.*, 15 Hun, 501; *Gray v. G. T. R. Co.*, 8 N. Y. Wkly. Dig. 372; *Jetter v. N. Y. C. & H. R. R. R. Co.*, 2 Keyes, 161; *McGrath v. N. Y. C. & H. R. R. R. Co.*, 63 N. Y. 522; *Ernst v. H. R. R. R. Co.*, 35 id. 9, 10, 28; 1 S. & R. on Neg. [4th ed.] 139, § 91; *Renwick v. N. Y. C. R. R. R. Co.*, 36 id. 132; *Tiler v. N. Y. C. R. R. Co.*, 49 id. 47; *Coleman v. S. Ave. R. R. Co.*, 41 Hun, 380; *Bassett v. Fish*, 75 N. Y. 303; *Clayards v. Dethick*, 12 Q. B. 439.) The plaintiff and the servants of defendant were not co-employees. (*Wood on Master & Servant*, 807-8, § 424; *Id.*, 835, § 435; *K. P. R. R. Co. v. Sul-*

Opinion of the Court, per HAIGHT, J.

mon, 11 Kan: 83; *Yeomans v. C. C. S. N. Co.*, 44 Cal. 71; *Sadler v. Hemlock*, 4 E. & B. 576; *Swinson v. A. S. S. Co.*, 57 N. Y. 108; 2 Thompson on Neg. 1026; S. & R. on Neg. [4th ed.] 384, § 225; *Abraham v. Reynolds*, 5 H. & N. 143; *Warburton v. G. W. R. Co.*, L. R. [2 Exch.] 30; *Sawyer v. R. & B. R. Co.*, 27 Vt. 370; *Young v. N. Y. C. R. R. Co.*, 30 Barb. 229; *Smith v. N. Y. & H. R. R. Co.*, 19 N. Y. 127; *Sullivan v. T. R. R. Co.*, 21 N. Y. S. R. 827.)

HAIGHT, J. This action was brought to recover damages for a personal injury.

The plaintiff was in the employ of the Rome, Watertown and Ogdensburg Railroad Company, and, on the day of the injury, was engaged in repairing a car which was standing upon the south branch track of that company's yard at Rome; the car stood about 417 feet west of the switch by which this track was entered, and was the second westerly car of quite a number that stood upon this branch. He was engaged on the west end of the car in turning a nut upon a bolt between the bumpers of the car, and, in doing so, supported himself with one hand hold of the bumper over the end thereof, whilst he worked a wrench with the other hand, and at this instant an unattended freight car moved down from the switch, on a slightly descending grade, colliding with the car in front of the one upon which the plaintiff was working, thus driving his car against the one in the rear, causing the bumpers to come together, which were about six inches apart, crushing his arm.

The defendant had an engine and crew under the charge of one Deming, who were engaged in picking up the cars that were marked to go east over the defendant's road, and, in so doing, it is claimed, on behalf of the plaintiff, that they backed down on an adjoining track, known as the "cattle track," where they coupled onto three cars nearly opposite of the place where the plaintiff was at work; that they drew the cars east of the switch, entering the south branch, then turned the switch, uncoupled the rear car and backing up,

Opinion of the Court, per HAIGHT, J.

shunted it down on the south branch against the cars where the plaintiff was at work. Upon the part of the defendant it is claimed that these cars stood upon the cattle track east of the switch; that the rear car was not coupled onto the other cars, and that the brakes were not set upon it; that the engine was backed up slowly, hitched onto the two cars which were marked to go east upon the defendant's road; that they were drawn out upon the main track, and that the rear or third car was left standing there, and that it commenced to move west down the branch, and thus in that way collided with the cars upon which the plaintiff was working.

Upon these claims, there was a conflict in the evidence which the trial court submitted to the jury with proper instructions, satisfactory to the parties and not excepted to. The jury found a verdict for the plaintiff, upon which a judgment was entered. The trial court denied a motion for a new trial, and both such order and judgment have been affirmed by the General Term, thus finally disposing of the questions of fact, leaving no further right of review.

It was further claimed on the part of the plaintiff that Deming knew that the plaintiff was at work repairing the car upon the south branch; that he had called plaintiff's attention to it that morning and asked him to repair it, so that it could be taken east upon the defendant's road that afternoon; that plaintiff had also posted his danger flag upon the car in front of him so that it could be plainly seen from the switch, thus warning the defendant's servants not to run cars down upon it. These claims were hotly contested upon the trial, and also became questions of fact which were submitted to and disposed of by the jury.

Under these circumstances, a motion for a non-suit was properly denied. The question of the defendant's negligence became one for the jury. Assuming, as we must upon this review, that the facts were as testified to by the plaintiff's witnesses, the defendant's conductor, Deming, was guilty of negligence in shunting an unattended freight car down upon the branch track against the cars under which the plaintiff

Opinion of the Court, per HAIGHT, J.

was working, when he knew he was at work there, or could have seen his warning flag by looking.

Under the circumstances, the question of the plaintiff's contributory negligence was also a question for the jury. He had posted his flag in the proper place; it was necessary for him to be under the car in part, in order to make the necessary repairs. The taking hold of the bumper with one hand, for the purpose of supporting himself, whilst he worked the wrench with the other, under the peculiar circumstances of this case, could not be said to be negligence, as a matter of law, for he had the right to suppose that the defendant's servants would discharge their duty and would not disregard his signal flag. Neither do we regard his neglect to set the brakes of the car on which he was at work, or the one in front of it, as necessarily negligent. It is true that one of the rules of the company, for which the plaintiff was at work, required the station agent to see that the brakes were set and properly secured on cars standing at their station, so as to avoid the possibility of their being blown onto the main track. The plaintiff, however, was not the station agent; neither was it his duty to attend the switches or set the brakes upon the cars at the station. He was a car repairer. These cars stood at a distance from the switch, on a down grade therefrom, and were in no immediate danger of being blown up grade onto the main track. Furthermore, we are not satisfied, from the evidence, that the setting of the brakes upon these cars would have prevented the accident. The bumpers were but six inches apart, and, unless the force of the colliding car was very slight, it would have moved the cars sufficiently, even with the brakes set, to bring these bumpers together. It is true that the witness Wolverton, who was a brakeman in the employ of the defendant, gave it as his opinion that the cars would not have come together had the brakes been set; but this opinion was based upon no fact which made him a competent judge. He did not see the car in motion that collided with the cars on which the plaintiff was at work, for, at the time, he himself was under the car assisting the plaintiff.

Statement of case.

We have examined the exceptions made to the charge of the court, but we are of the opinion that none call for a reversal of the judgment.

The judgment should, therefore, be affirmed with costs.

All concur, except FOLLETT, Ch. J., not sitting.

Judgment affirmed.

GENEVIEVE BAKER, Respondent, v. THE MANHATTAN RAILROAD
COMPANY, Appellant.

In an action to recover damages for injuries to plaintiff, a passenger on one of defendant's trains, alleged to have been caused by defendant's negligence, plaintiff's evidence was to the effect that when the train stopped at her station, the guard whose duty it was to open the door of the car and fasten it by a catch provided for the purpose, and to open the gate on the platform, was absent from his post; that plaintiff opened the door, but did not shove it back over the catch, and stood in the doorway waiting for the opening of the gate; that when the guard came and opened the gate, he at the same time gave the signal for the train to start, which it did before she had time to leave the doorway, causing the door to swing to, upon her hand, injuring a finger. *Held*, that the question of defendant's negligence and of contributory negligence on the part of plaintiff were properly submitted to the jury.

Plaintiff was a teacher in a public school, and also a private music teacher. She proved that she was unable to attend her school for six weeks, and for that period lost her salary as teacher; that the injury to her finger rendered it so sensitive that she could not strike the keys of the piano; that in giving music lessons it was necessary for her to play in connection with her instructions. There was no evidence as to the amount of her salary, or of her wages as a music teacher. The court charged, among other things, that "nothing can be allowed specifically for any of these items." Defendant's counsel requested the court to charge that there was no evidence upon which they could give any damages for loss of time as a music teacher, or for absence from her position as school teacher. This was refused, except as already charged. *Held*, no error. Reported below, 22 J. & S. 394.

(Argued January 27, 1890; decided February 25, 1890.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made

Statement of case.

May 2, 1887, which affirmed a judgment in favor of plaintiff, entered upon a verdict, and affirmed an order denying a motion for a new trial.

The nature of the action and the facts are sufficiently stated in the opinion.

Brainard Tolles for appellant. The defendant was not shown to be guilty of any negligence contributing to the injury. (*Morris v. N. Y. C. R. R. Co.*, 106 N. Y. 678; *Lafflin v. B. & S. W. R. R. Co.*, Id. 136; *Palmer v. P. Co.*, 111 id. 488; *Kelly v. M. R. Co.*, 112 id. 443; *Kelly v. N. Y. & S. B. R. R. Co.*, 109 id. 44; *Wangler v. Swift*, 90 id. 45; *M. R. R. Co. v. Jackson*, 3 App. Cas. 193; *Cleveland v. N. J. S. Co.*, 68 N. Y. 306; *Williams v. D., L. & W. R. R. Co.*, 39 Hun, 430; *Lewis v. F., etc., R. R. Co.*, 54 Mich. 55; *Henry v. S. L., etc., R. R. Co.*, 76 Mo. 288; *Burrows v. E. R. Co.*, 63 N. Y. 556; *P. R. R. Co. v. Aspell*, 23 Penn. St. 147; *L. S., etc., R. R. Co. v. Bangs*, 47 Mich. 470; *Shner v. G. W. R. R. Co.*, L. R. [3 Ex. Div.] 154; *Luz v. Darlington*, Id. [5 id.] 35; *Wyatt v. G. W. R. R. Co.*, 6 B. & S. 709; *Patterson on Railways*, 21.)

James M. Hunt for respondent. The motion to dismiss was properly denied. (*Bartholomew v. N. Y. C. & H. R. R. Co.*, 102 N. Y. 716; *Keating v. N. Y. C. & H. R. R. R. Co.*, 49 id. 673; *Sauter v. N. Y. C. & H. R. R. R. Co.*, 66 id. 50; *Lilly v. N. Y. C. & H. R. R. R. Co.*, 107 id. 566, 577; *Stuckus v. N. Y. C. & H. R. R. R. Co.*, 79 id. 464, 466; *Massoth v. D. & H. C. Co.*, 64 id. 524, 529; *Dolan v. D. & H. C. Co.*, 71 id. 285; *McGrath v. N. Y. C. & H. R. R. R. Co.*, 63 id. 525; *Casey v. N. Y. C. & H. R. R. R. Co.*, 8 Daly, 220, 223; 78 N. Y. 518; *Wood v. N. Y. C. R. R. Co.*, 70 id. 195.) The motion for a non-suit was properly denied. (*Hart v. H. R. B. Co.*, 80 N. Y. 622; *Turner v. City of Newburgh*, 109 id. 301, 310.) A general objection fails to point out any error in the question put to witnesses. (*Tiemeyer v. Turnquist*, 85 N. Y. 516, 523; *Quimby v.*

Opinion of the Court, per HAIGHT, J.

Strauss, 90 id. 664; *N. J. S. B. Co. v. Mayor, etc.*, 109 id. 621.) There was no error in the charge. (*Rexter v. Starin*, 73 N. Y. 601; *Newall v. Bartlett*, 114 id. 399, 405; *Staal v. G. S. & N. R. R. Co.*, 107 id. 625, 627; *Masterton v. Village of Mt. Vernon*, 58 id. 391, 396; *Curtis v. R. & S. R. R. Co.*, 18 id. 542; *Losee v. Buchanan*, 51 id. 476, 492; *Caldwell v. N. J. S. Co.*, 47 id. 282, 290.)

HAIGHT, J. This action was brought to recover damages for a personal injury. The plaintiff was a teacher in one of the public schools in the city of New York, and was also engaged as a private teacher of music. Her story is, in substance, that on the morning of the 22d of May, 1883, she took a train upon the defendant's road to go to her school; that the place for her to alight was at the Seventy-sixth street station; that after the train had arrived at the station and stopped, she arose from her seat, went to the door, opened it and stood upon the sill of the door in the doorway waiting for the guard to open the gates to the platform, so that she could leave the train; that he was not at that time upon the platform of the car, but soon came running through the forward car in front of her; that he opened the gate and pulled the strap, signaling the train to start at the same instant; that the train did start before she had time to leave the doorway, and, in starting, caused her to pitch forward, and, to prevent herself from falling, she put her hand up by the side of the door; that the motion of the car caused the door to swing to upon one of the fingers of her hand, injuring it.

The testimony of the defendant's witnesses is to the effect that the guard was at his place on the platform as the train drew up to the station; that before arriving at the station, she arose and opened the door on her own accord and stood in the doorway waiting for the train to stop; that as the brakes were applied to stop the train at the station, the door swung to onto her finger. Some criticism has been made in reference to a discrepancy in her testimony, in which she first stated that she stood up and waited until the car started, and then

Opinion of the Court, per HAIGHT, J.

opened the door herself, and, in the same connection, states that she remained in the doorway until the guard came and pulled the strap and started the car. It is quite evident that in her first expression, she either mis-spoke or was incorrectly reported, for one of the two expressions could not well be true, and, in her subsequent testimony, she makes the question clear, for she distinctly testified that she did not open the door until the car had stopped. But these questions were for the jury. They were submitted under proper instructions by the court, and the finding has been approved by the General Term, and the questions of fact thus raised are not open for further review. Assuming, therefore, that the facts are as testified to by the plaintiff, was the defendant guilty of negligence which contributed to or caused the injury? It is conceded that it was the duty of the guard to be upon the platform of the car when it stops at a station, to open the door and also the gate upon the platform, so as to afford ingress and egress to and from the car. On this occasion, the guard was absent from his post of duty, but it is urged that his absence was not the proximate cause of this injury, but had he been at his post of duty and opened the door and fastened it back, by the catch provided for that purpose, and opened the gate to the platform of the car, the plaintiff could have alighted without injury. This, however, was not all, for at the instant that he did open the gate, he signaled the train to start, before giving her time to alight and whilst she was still standing in the doorway, and by thus starting the train, caused the door to swing to upon her hand. The starting of the train at that instant was the proximate cause of the injury, and, under the circumstances of the case, the verdict of the jury to the effect that the defendant was chargeable with negligence is justified by the plaintiff's evidence. The question as to the plaintiff's contributory negligence, we regard as more serious, but we are inclined to the opinion that it became a question for the determination of the jury. If, in opening the door, she had shoved it back over the catch, the door would not have swung to upon her hand; but if, as she testified, the car had stopped and was standing still

Opinion of the Court, per HAIGHT, J.

at the time she opened the door, it doubtless would not have injured her had she been given an opportunity to alight from the platform before the train was again put in motion, causing the door to close. She had arrived at the station at which she was to alight; she was not compelled to remain inside of the car and be carried beyond her destination. She but did what nearly every other person would do under like circumstances; finding that the guard was not at his post, opened the door so that she could attract his attention in time to have the gate of the platform open before the train again started.

The court was asked to charge the jury that there was no evidence upon which they could give any damages for the loss of time, as a music teacher, and that there was no evidence that the plaintiff suffered any damages from being absent from her position as a teacher in the public school, and that they could give no damages for such absence. The court refused to charge either of these propositions except as already charged. The court had charged upon this subject as follows: "But the damages to which the plaintiff is entitled, in case she is entitled to recover at all, includes her physical pain and mental suffering, and such general inability to attend to any business as a music teacher, which the evidence with reasonable certainty shows she has sustained. There is no evidence of any specific loss of business or loss of time in her business, and no evidence of any expense or liability in dollars and cents, incurred for medical expenses. Hence nothing can be allowed specifically for any of these items." There was evidence to the effect that she was unable to attend her school for six weeks, and that she lost her salary, as such teacher, for that time; that the injury to her finger was of that character as to render it so sensitive that she could not strike the keys of a piano with it, and that in giving music lessons it was necessary for her to play, in connection with her instructions. But there was no evidence as to the amount of the salary paid her as a teacher in the public school, or as to the amount of her wages as a private teacher of music. She was, consequently, entitled to recover nominal damages only for these items. (*Leeds v.*

Statement of case.

Metropolitan Gas Light Co., 90 N. Y. 26.) And such was the instruction evidently intended to be given by the trial court, for the attention of the jury was called to the fact that there was no evidence of any specific loss of business or of time, and no evidence of any expense or liability in dollars and cents incurred for medical expenses, and that nothing could be allowed specifically for any of those items. It is true that the word nominal was not used and the word specifically was used, but we think the jury correctly understood the court and was not misled by the use of that word. But, again, the requests to charge were too broad. They were to the effect that the jury could not give *any* damage. This would exclude the right to recover nominal damages. Consequently the exceptions taken to the refusal to charge these propositions are unavailing.

The judgment should be affirmed with costs.

All concur.

Judgment affirmed.

MARCUS M. BEEMAN, Respondent, v. GEORGE A. BANTA, Appellant.

Defendant contracted to construct a refrigerator for plaintiff, who was engaged in the business of preparing poultry for market, and with knowledge that plaintiff intended to at once make use of the refrigerator for freezing and preserving chickens for the May market following, expressly warranted that the freezer would keep them in perfect condition; this it failed to do, and in consequence a large quantity of chickens were lost. In an action upon the warranty, the court charged in substance, that plaintiff was entitled to recover as damages the difference between the value of the refrigerator as constructed and its value as it would have been if made according to contract, and also to recover the market value of the chickens lost, less cost of getting them to market and fees of commission men charged on sale. *Held*, no error.

N. Y. I. & M. M. P. Co. v. Remington (109 N. Y. 143), distinguished.

(Submitted January 27, 1890; decided February 25, 1890.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made July 1, 1887, which affirmed a judgment in favor of

Statement of case.

plaintiff entered upon a verdict, and affirmed an order denying a motion for a new trial.

Rhodes, Coons & Higgins and *John H. Parsons* for appellant. The statement of the defendant relied upon as the foundation of this action as a warranty, was not intended as such by the defendant, and apparently was not relied upon at the time of the contract, and does not, under the circumstances, constitute a warranty. (*Sweett v. Colgate*, 20 Johns. 196; *O. Mfg. Soc. v. Lawrence*, 4 Cow. 440; *Reed v. Randall*, 29 N. Y. 358-361; *Rust v. Eckler*, 41 id. 488, 491; *Hoe v. Sanborn*, 21 id. 552; *Day v. Pool*, 52 id. 416, 420.) The question of the construction of the language used on which this express warranty alleged in the complaint is founded, should not have been submitted to the jury, as it was done. (*Dwight v. G. L. Ins. Co.*, 103 N. Y. 341.) Plaintiff waived his right to damages by paying for this refrigerator after he had discovered the alleged defect. (*M. M. P. Co. v. Remington*, 109 N. Y. 143; *Brown v. Burhans*, 4 Hun, 227; *G. C. M. Co. v. Mann*, 24 Wkly. Dig. 483; *Bennett v. Buchan*, 76 N. Y. 386.) Plaintiff having known of the alleged defect before putting in his poultry, should not recover for its loss. (1 *Sutherland on Dam.* 141; *Short v. Kalloway*, 11 A. & E. 28; *Whrightup v. Chamberlain*, 7 Scott, 598.) The basis of value of the damaged chickens were furnished only by the evidence of the plaintiff himself, and he was not shown competent to speak on the subject. (*Harris v. P. R. R. Co.*, 58 N. Y. 660; *Graham v. Maitland*, 6 Abb. Pr. [N. S.] 327; 1 *Sweeney*, 149; *Harris v. Ely*, 1 Seld. Notes, 35; *Greeley v. Stilson*, 27 Mich. 153; *Terpenning v. C. E. Ins. Co.*, 43 N. Y. 279; *Bush v. W. F. Ins. Co.*, 2 T. & C. 629; *Whelan v. Lynch*, 60 N. Y. 469.) The mere fact that a witness has once bought or sold the very article in question does not necessarily qualify him to express an opinion upon its value, although the price he paid or received may be competent evidence. (*Watson v. Bauer*, 4 Abb. Pr. [N. S.] 272; *Smith v. Hill*, 22 Barb. 656; *Chambovet v. Cagney*, 2 J. & S.

Opinion of the Court, per PARKER, J.

474, 489.) The rule of damages as applied on this trial as to the refrigerator was erroneous, and sufficient alone to reverse the judgment. (*M. M. P. Co. v. Remington*, 109 N. Y. 143.)

Baldwin & Kennedy for respondent. Plaintiff had the right to show what the chickens would be worth in market at the time and place contemplated in the bargain as the time and place of sale, and the amount, less transportation and commission in selling, and what was realized from chickens sold, added to the damages on the freezer, would be the correct measure of damages. (*Passinger v. Thorburn*, 34 N. Y. 634; *White v. Miller*, 71 id. 133; *Day v. Poole*, 52 id. 419, 420; *Wakeman v. W. & W. M. Co.*, 101 id. 205; *Reed v. McConnell*, Id. 276; *Dart v. Laimbeer*, 107 id. 669.) The motion for a non-suit when plaintiff rested, should have been denied. (*Briggs v. Hilton*, 99 N. Y. 517; *Day v. Pool*, 52 id. 416; *Dounce v. Dow*, 57 id. 15; *Kent v. Friedman*, 101 id. 616.)

PARKER, J. The recovery in this action was for damages claimed to have been sustained because of a breach of an express warranty on the part of the defendant to so construct a freezer for the plaintiff as that chickens could be kept therein in perfect condition.

The jury have found the making of the warranty, its breach and the amount of damages resulting therefrom. The General Term have affirmed these findings and as there is some evidence to support each proposition, we have but to consider the exceptions taken.

The appellant excepted to the charge of the court respecting the measure of damages. Upon the trial he insisted, and still urges, that the proper measure of damages is the cost of so changing the freezer as to obviate the defect and make it conform to the warranty, and *N. Y. S. Monitor Milk Pan Co. v. Remington* (109 N. Y. 143) is cited in support of such contention. That decision was not intended to, nor does it

Opinion of the Court, per PARKER, J.

modify, the rule as recognized and enforced in *Passinger v. Thorburn* (34 N. Y. 634); *White v. Miller* (71 N. Y. 133); *Wakeman v. Wheeler & Wilson Mfg. Co.* (101 N. Y. 205); *Reed v. McConnell* (101 N. Y. 276), and kindred cases.

In that case the argument of the court demonstrates: First, that improper evidence was received; and second, that the finding of the referee was without evidence to support it. No other proposition was decided. And the discussion is not applicable to the facts before us.

The plaintiff was largely engaged in preparing poultry for market which he had either raised or purchased. Before meeting the defendant he had attempted to keep chickens for the early spring market in a freezer or cooler which he had constructed for the purpose. The attempt was unsuccessful and resulted in a loss.

The jury have found in effect that the defendant, with knowledge of this intention of the plaintiff to at once make use of it in the freezing and preservation of chickens for the May market following, expressly represented and warranted that for about \$500 he would construct a freezer which should keep them in perfect condition for such market.

That he failed to keep his contract in such respect, resulting in a loss to the plaintiff of many hundred pounds of chickens.

The court charged the jury that if they should find for the plaintiff, he was entitled to recover, as one of the elements of damage, the difference between the value of the refrigerator as constructed, and its value as it would have been if made according to contract. The correctness of this instruction does not admit of questioning. Had the defendant made no use of the freezer, such rule would have embraced all the damages recoverable. But he did make use of it, and such use as was contemplated by the contract of the parties. The result was the total loss of hundreds of pounds of chickens.

The fact that the defendant well knew the use to which the freezer was to be immediately put, his representation and warranty that it would keep chickens in perfect condition,

Opinion of the Court, per PARKER, J.

burdens him with the damage sustained because of his failure to make good the warranty.

Upon that question, the court instructed the jury that the plaintiff was entitled to recover the value of the chickens less cost of getting them to market, including freight, and fees of commission merchant.

The question of value was left to the jury, but they were permitted to consider the evidence tending to show that frozen chickens were worth forty cents a pound in the market during the month of May.

Such instruction we consider authorized. The object of the freezer was to preserve chickens for the May market. The expense of construction, and trouble, as well as expense of operation, was incurred and undertaken in order to secure the enhanced prices of the month of May. It was the extra profit which the plaintiff was contracting to secure, and in so far as the profits contemplated by the parties can be proven, they may be considered. Gains prevented as well as losses sustained are proper elements of damage. (*Wakeman v. Wheeler & Wilson Mfg. Co.*, 101 N. Y. 205.)

We have carefully examined the other exceptions to the charge as made and to the refusals to charge as requested, and also the exceptions taken to the admissibility of testimony, but find no error justifying a reversal.

The insistence of the appellant that the judgment be reversed because against the weight of evidence, may have been entitled to some consideration by the General Term, but it cannot be regarded here.

The judgment should be affirmed.

All concur, except FOLLETT, Ch. J., and VANN, J., not sitting.
Judgment affirmed.

Statement of case.

MARGARET SLATTERY, Appellant, v. ALBERT F. SCHWAN-
NECKE et al., Respondents.

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In an action to redeem certain premises from a mortgage executed to defendant H. in 1877 and duly recorded, it appeared that the property was conveyed to plaintiff in 1878, but his deed was not recorded until 1881, prior to which date the mortgage was foreclosed by H., the property being bid in by him at the sale. The deed to H. was recorded December 17, 1880. Plaintiff was not made a party to the foreclosure action, but due notice of its pendency was filed. On February 4, 1881, H., conveyed the premises to defendant S., a *bona fide* purchaser, for a good consideration. The deed to S. was recorded March 9, 1881. The court found that plaintiff took actual possession of the premises under her deed, and that H. had actual and express notice of such deed. *Held*, that plaintiff was not entitled to recover; that S. acquired by his deed from H. not only his title, but, through the foreclosure proceedings, the title of the mortgagor; that S. was entitled to the protection given by the recording act against the prior unrecorded deed of plaintiff, and this, without regard to the question whether H. had or had not notice of plaintiff's deed; also that plaintiff was bound by the judgment in the foreclosure suit the same as if he had been a party thereto. (Code Pro. § 132.)

It appeared that the attorneys for H. in the foreclosure suit, and who had made the loan to the mortgagor, were informed of her deed before the foreclosure. This knowledge was not acquired in any matter or proceedings relating to the making of the loan or the foreclosure of the mortgage, or while engaged in the transaction of any business for H. *Held*, that plaintiff was not charged with notice of said deed.

The knowledge of an agent can be charged to the principal only when clear proof is made that the knowledge was present in the agent's mind at the time of the transaction which is the subject of consideration.

Reported below, 44 Hun, 75.

(Argued January 27, 1890; decided February 25, 1890.)

APPEAL from an order of the General Term of the Supreme Court in the first judicial department, made March 31, 1887, which reversed a judgment in favor of plaintiff entered upon a decision of the Special Term, and granted a new trial.

The nature of the action and the facts are sufficiently stated in the opinion.

Statement of case.

James C. De La Mare for appellant. As the order of reversal does not state that it was made upon the facts, this court is bound to presume that it was on questions of law, and to reverse it if no error of law is shown. (Code Civ. Pro. § 1338; *Lewis v. Bouton*, 106 N. Y. 70.) The facts found amply support the judgment. (*Meehan v. Forrester*, 52 N. Y. 275; *Hart v. Ten Eyck*, 2 Johns. Ch. .) The court cannot, on the case as presented, determine whether or not the finding was without evidence to support it. (*Porter v. Smith*, 107 N. Y. 531; 35 Hun, 118.) The finding that Hewlett had notice of the deed to plaintiff is not without evidence tending to sustain it. (*Dolan v. Merritt*, 18 Hun, 27; 3 Wait's Pr. 307; *Bennett v. Johnson*, 21 N. Y. 238; Baylies on N. T. & App. 174, 290; *Cox v. Pierce*, 112 N. Y. 637; *Dunn v. Hornbeck*, 72 id. 80, 89; Thomas on Mort. §§ 489, 490; *Flagg v. Mann*, 2 Sum. 554; *Read v. Gannon*, 50 N. Y. 345; *Ellis v. Hoorman*, 90 id. 466.) The Lawtons being the attorneys and agents for Hewlett, notice to them was, in law, notice to Hewlett. (*Bank of U. S. v. Davis*, 2 Hill 451; *Ingalls v. Morgan*, 10 N. Y. 178, 184, 185; *Dillon v. Andrews*, 43 id. 231, 238; *Bank v. Frank*, 13 J. & S. 415; *Holden v. N. Y. & E. Bank*, 74 N. Y. 286, 292; *Craigie v. Hadley*, 99 id. 131-134.) The defendant Schwannecke is in no better position than Hewlett. (*Davis v. Duffrie*, 18 Abb. Pr. 360; *Dias v. Merle*, 4 Paige, 259; *Winslow v. Clark*, 47 N. Y. 261; *Hickock v. Scribner*, 3 Johns. Cas. 311; 2 Jones on Mort. § 1101; Thomas on Mort. § 705; *Raynor v. Wilson*, 6 Hill, 469; *Wood v. Chapin*, 13 N. Y. 520; *Gillig v. Mass*, 28 id. 208; *Tabbell v. West*, 86 id. 288.) There was no contradiction of Slattery's evidence that he made the tender, and that it was refused. It was properly made to Hewlett's attorney and agent. (*Miner v. Beekman*, 11 Abb. [N. S.] 147; Thomas on Mort. 235; *Beach v. Crooke*, 28 N. Y. 535.) If plaintiff is entitled to redeem, the right to redeem carries with it the right to an accounting. (*Pratt v. Stiles*, 9 Abb. Pr. 150.)

Abner C. Thomas for respondent. The court at Special

Opinion of the Court, per BROWN, J.

Term erred in finding that the defendant Hewlett, at and before the commencement of the action to foreclose said mortgage, had actual and express notice of the deed to Margaret Slattery. (*Constant v. University*, 111 N. Y. 604, 611.) Even if absolute proof of personal notice to Mr. Hewlett individually, before the commencement of the foreclosure, could be found in the case, this would not sustain the judgment of the Special Term. (Code Civ. Pro. § 1671; *Stern v. O'Connell*, 35 N. Y. 104; *Lamont v. Cheshire*, 65 id. 30, 38; *Ayrault v. Murphy*, 54 id. 203; *Kindberg v. Freeman*, 39 Hun, 466; *Kipp v. Brandt*, 49 How. Pr. 358; *Ostram v. McCann*, 21 id. 431; *Hall v. Nelson*, 23 Barb. 88; 14 How. Pr. 32.) The judgment was properly reversed as to the defendant Schwannecke, as to whom no notice of any kind is pretended. (*Wood v. Chapin*, 13 N. Y. 509; *Fort v. Burch*, 5 Denio, 187; *Westbrook v. Gleason*, 79 N. Y. 23, 31; *Decker v. Boice*, 83 id. 215, 221; *Varick v. Briggs*, 6 Paige, 323; Jones on Mort. § 583; *L. F. Co. v. L. G. & F. Co.*, 82 N. Y. 476; *Jackson v. McChesney*, 7 Cow. 360.) Even if the plaintiff could sustain the claim for redemption, a new trial would be necessary, for the reason that the judgment of the Special Term is erroneous with respect to the principles laid down in it as to which redemption is to be had. (*Packer v. R. & S. R. R. Co.*, 17 N. Y. 283; *Hart v. Wandle*, 50 id. 381; *Gage v. Brewster*, 31 id. 218; *Winslow v. Clark*, 47 id. 261; *Raynor v. Selmes*, 52 id. 579; *Vanderkemp v. Shelton*, 11 Paige, 28; *Parker v. Child*, 25 N. J. Eq. 41; *Seward v. Huntington*, 94 N. Y. 104, 114; *Franklyn v. Hayward*, 61 How. Pr. 43; *Mickles v. Dillaye*, 17 N. Y. 80; *Wetmore v. Roberts*, 10 How. Pr. 51; *Fogal v. Pirro*, 17 Abb. Pr. 113; *Miner v. Beeckman*, 50 N. Y. 337; *Brinckerhoff v. Lansing*, 4 Johns. Ch. 65; *Perine v. Dunn*, Id. 140.)

BROWN, J. This action was brought to redeem certain real estate situated in the city of New York from a mortgage executed by Clara Decker and Peter P. Decker, her husband, to the defendant Hewlett, to secure the sum of \$2,000, and bearing

Opinion of the Court, per BROWN, J.

date December 13, 1877, and duly recorded in the register's office of said city.

The plaintiff became the owner of the property by deed from said Deckers dated July 25, 1878, but not recorded until March 15, 1881.

Intermediate, the date of plaintiff's deed and the date of its record, the defendant Hewlett foreclosed his mortgage by action in the Supreme Court, and on the 28th day of October, 1880, received a deed from Thomas Nolan, referee, pursuant to a sale made under the judgment rendered in said foreclosure action, which deed was duly recorded December 17, 1880. The plaintiff was not made a party to that action, but a notice of the pendency of the action, in the form required by the Code, was duly and regularly filed in the office of the clerk of the city and county of New York on July 16, 1880.

On February 4, 1881, Hewlett conveyed the premises to the defendant Schwannecke for the consideration of \$2,500, of which \$500 was paid in cash, and the balance secured by a mortgage upon the same premises. The deed to Schwannecke was recorded on March 9, 1881.

The General Term reversed the interlocutory judgment entered at the Special Term in the plaintiff's favor, and as the order of that court does not state that such reversal was upon the facts, we must presume it to have been upon the law. The facts found by the trial court are not, therefore, open to review here, so far as they are supported by evidence.

The court found that the plaintiff took actual possession of the premises under her deed, and that the defendant Hewlett had actual and express notice of the deed to the plaintiff. Schwannecke was a *bona fide* purchaser of the premises for a valuable consideration. (*Lacustrine Fertilizer Co. v. Lake Guano & Fertilizer Co.*, 82 N. Y. 476; *Wood v. Chapin*, 13 N. Y. 509.)

He acquired by his deed from Hewlett not only Hewlett's title, but, through the medium of the foreclosure proceedings, the title of Mrs. Decker, the mortgagor, and such deed was a bar against her and all parties to the suit. (Code Civ. Pro. § 1632; *Seward v. Huntington*, 94 N. Y. 104-114.)

Opinion of the Court, per BROWN, J.

This defendant was, therefore, entitled to the protection given by the recording act against the prior unrecorded conveyance of the plaintiff, and this without regard to the question whether Hewlett had or had not notice of the plaintiff's deed. (*Wood v. Chapin, supra*; *Decker v. Boice*, 83 N. Y. 215.)

As to this defendant the judgment was properly reversed by the General Term.

The defendant Hewlett excepted to the findings of the trial court which I have quoted, and under such exceptions the question is presented in this court, as one of law, whether there is any evidence tending to support such findings, and upon that question we will presume that all the evidence given upon the subject embodied in those findings is contained within the case. (*Halpin v. Phenix Ins. Co.*)*

We find no evidence in the record showing that the plaintiff ever had "actual possession" of the premises, or that Hewlett had "actual and express notice" of the plaintiff's deed as found by the Special Term.

It does appear, however, that the attorneys for Hewlett in the foreclosure suit, and who had also made the loan to Mrs. Decker, had notice of plaintiff's deed. This knowledge was not acquired in any matter or proceedings relating either to the making of the loan or the foreclosure of the mortgage, nor while engaged in the transaction of any business for Mr. Hewlett, but the information was received from the plaintiff's husband upon a visit by him to the attorneys' office, to inquire about an abstract of title of the property, a matter that concerned neither the attorneys or Hewlett, but the plaintiff alone. And for the purpose of supporting the judgment, we may presume the fact to be in accordance with this evidence, and give to it the same effect as if it had been found by the trial court.

The question how far a principal is chargeable with notice communicated to or knowledge acquired by his agent in another transaction at another time, when not acting for his

*Note, *ante*, p. 165.

Opinion of the Court, per BROWN, J.

principal, has recently received consideration in this court in the case of *Constant v. University of Rochester* (111 N. Y. 604), and the principle was there settled that the knowledge of the agent can be charged to the principal only when clear proof is made that the knowledge was present in the agent's mind at the time of the transaction which is the subject of consideration by the court. Within the doctrine of that case the attorneys' knowledge cannot be imputed to Hewlett, as there is not only no proof that at the time of the foreclosure they had in mind the fact that plaintiff held a deed for the property, but all the evidence in the case tends to the opposite conclusion, as it shows that they supposed and believed that one John Slattery was the owner, and was for that reason made a defendant in the action.

We think, therefore, that the plaintiff's case falls within section 132 of the Code of Procedure, which was in force at the time of the filing of the notice of pendency of action in the foreclosure suit, and which provided that "from the time of filing only shall the pendency of the action be constructive notice to a purchaser or incumbrancer of the property affected thereby, and every person whose conveyance or incumbrance is subsequently executed or *subsequently recorded* shall be deemed a subsequent purchaser or incumbrancer, and shall be bound by all the proceedings taken after the filing of such notice to the same extent as if he were made a party to the action."

Plaintiff's deed was not recorded until after all the other deeds for the property had been placed upon the record, and she was, therefore, bound by the judgment of foreclosure to the same extent as if she had been a party to the action.

In view of the very satisfactory opinion delivered at the General Term, it is not deemed necessary to discuss the questions involved at greater length.

The order should be affirmed and judgment absolute rendered against appellants, with costs.

All concur.

Order affirmed and judgment accordingly.

1890.]

VAN CLEAF v. BURNS et

Statement of case.

MARY B. VAN CLEAF, Appellant, v. CATI
Respondents.

A decree dissolving a marriage for a cause not in the laws of this state, rendered in another state in violation of the subject and the parties, in an action by the husband, will not deprive the wife of her then existing rights in this state; at least, in the absence of evidence that the state where it was rendered, it has that effect. As to whether, even with such evidence, it will have that effect, *quære*.

The word "misconduct," in the provision of the Revised Statutes, § 1, declaring that "in case of divorce dissolved by the misconduct of the wife she shall not be liable to any act which may be termed misconduct," is not to any act which may be termed misconduct in this state, but to any act which may be termed misconduct in the cause of action by the Legislature of another state. The word "misconduct" which our laws recognize as sufficient to constitute adultery is, adultery.

It seems, the provisions of the Code of Civil Procedure, providing that where judgment is rendered, at the time of dissolving the marriage, the wife shall not be substituted for the provisions of the Revised Statutes, declaring that "a wife being a defendant in a suit by her husband, and convicted of adultery, shall be liable to the same consequences as if she were a plaintiff," and the repeal of the latter provision (Laws of 1880) left the law unchanged. *Van Cleaf v. Burns* (43 Hun, 461), reversed.

(Submitted January 22, 1890; decided February 1, 1890.)

APPEAL from judgment of the General Term of the Court in the second judicial department, made in an order made February 15, 1887, which affirmed the order in favor of defendant entered upon a decision rendered at Special Term.

The plaintiff brought this action to recover certain lands situate in the city of Brooklyn, of which lands Van Cleaf, deceased, was seized while he was living.

The complaint alleged that plaintiff was seized of the lands in question by Van Cleaf on the 6th of July, 1875, and that during said period, from July 6, 1875, to November 12, 1884; that during said period, from November 12, 1884, to the date of the complaint, the lands were held by the plaintiff.

Statement of case.

and possessed of the premises in question, and that the defendants are in possession thereof, claiming to own the same.

Without denying any of said allegations, the defendant Catharine Burns answered, alleging that on the 9th of April, 1881, said David Van Cleaf, who was then a resident of the state of Illinois, was duly divorced from the plaintiff on account of her misconduct by the judgment of a court in that state, which had jurisdiction of the subject-matter and of the parties.

The trial court found the following facts: "That in an action in the Circuit Court of Cook county, Illinois, in which David Van Cleaf was plaintiff, and said Mary B. Van Cleaf was defendant, brought for a divorce and dissolution of the marriage for the cause and ground that said Mary B. Van Cleaf had willfully deserted and absented herself from said David Van Cleaf, her husband, without any reasonable cause, for the space of more than two years before the commencement of such action, which, by the laws of Illinois, was a ground for absolute divorce and dissolution of the bond of marriage, such proceedings were had that, on April 9, 1881, judgment was granted and perfected therein in favor of said David Van Cleaf against said Mary B. Van Cleaf, dissolving the bond of marriage between them, for the cause and ground aforesaid, which cause and ground was, by said judgment, adjudged to exist.

"That said court, in pronouncing said judgment, had jurisdiction of the subject-matter of the action and judgment, and of the parties thereto.

"That said David Van Cleaf was, at the time of said action and judgment, domiciled in Chicago, in the state of Illinois, and said Mary B. Van Cleaf, on October 18, 1880, appeared in said action in person, and filed her answer in writing to the complaint, having first received notice of the commencement of the suit by the service on her in this state of the summons and complaint.

"That the plaintiff was, during all the time above mentioned, a resident of the city of Brooklyn in the state of New York."

Statement of case.

The court found, as a conclusion of law should be dismissed upon the merits, with plaintiff duly excepted.

The only proof given by either party, stipulation admitting the facts as found.

The case states that no other facts appear, stipulate, for the purpose of any appeal, that was seized in fee-simple of the premises on the date of his marriage to the plaintiff and divorce, and that such admission shall have, though found by the trial judge upon pro-

John H. Kemble for appellant. Under the state and their construction by our courts the marriage contract does not forfeit except as provided by statute. (*Erkenbri* 96 N. Y. 456; *Wait v. Wait*, 4 id. 95, 10 Alb. L. J. 425.) The divorce for the wife which will forfeit her right to dower adultery. (1 Greenl. on Ev. 294, § 7; N. Y. 78-88; 3 R. S. [5th ed.] 32, 237 *Estabrook*, 79 N. Y. 246-252; 3 R. S. 32, 52 N. Y. 593; *Schiffer v. Pruden*, 64 id. § 8; 3 id. 990, § 44; *In re Ensign*, 103 N. Y. *City of Cohoes*, 74 id. 387, 389; *In re* 442.) The divorce which will work a forfeiture intended by the statute, is by a judgment state. (*Sims v. Sims*, 75 N. Y. 466; *N.* 77 id. 400-410; *Van Vorhis v. Brink*, *Pitts v. Pitts*, 52 id. 593-595.) It is the laws of Illinois the judgment in question dower in that state. (*Cuyler v. Wrig* *Thorner v. Batory*, 41 Md. 593; *People* 78-88.)

Josiah T. Marean for respondent. The "duct" in section 8 of the chapter of the I

Estates in Dower, is used as a synonym for adultery. (*Harding v. Alden*, 9 Greenl. 140, 151-152; *Mansfield v. McIntyre*, 10 Ohio, 27-28; 4 Kent's Comm. 53, 54.)

VANN, J. Our Revised Statutes provide that "a widow shall be endowed of the third part of all the lands whereof her husband was seized of an estate of inheritance at any time during the marriage," (1 R. S. 740, § 1), but that "in case of divorce dissolving the marriage contract for the misconduct of the wife, she shall not be endowed." (Id. § 8.) It is further provided by the Code of Civil Procedure, that where final judgment is rendered dissolving the marriage in an action brought by the wife, her inchoate right of dower in any real property of which her husband then was or was theretofore seized shall not be affected by the judgment, but that when the action is brought by the husband, the wife shall not be entitled to dower in any of his real property, or to a distributive share in his personal property. (§§ 1759 and 1760.) These provisions of the Code replaced a section of the Revised Statutes which provided that "a wife being a defendant in a suit for a divorce brought by her husband, and convicted of adultery, shall not be entitled to dower in her husband's real estate, or any part thereof, nor to any distributive share of his personal estate." (2 R. S. 146, § 48, repealed L. 1880, ch. 245, § 1, sub. 4.)

An absolute divorce could be granted only on account of adultery, under either the Revised Statutes or the Code. (3 R. S. [6th ed.] 155, §§ 38-42; Code Civ. Pro. §§ 1756, 1761.) According to either, an action could be brought to annul, to dissolve or to partially suspend the operation of the marriage contract. A marriage may be annulled for causes existing before or at the time it was entered into, and the decree in such cases destroys the conjugal relation *ab initio* and operates as a sentence of nullity. (Code Civ. Pro. §§ 1742, 1754.) A marriage contract may be dissolved and an absolute divorce, or a divorce proper, granted for the single cause already mentioned. Such a judgment operates from the date of the decree

Opinion of the Court, per VANN, J.

by relieving the parties from the obligations of the marriage, although the party adjudged to be guilty is forbidden to remarry until the death of the other. It has no retroactive effect except as expressly provided by statute. (*Wait v. Wait*, 4 N. Y. 95.) An action for a separation, which is sometimes called a limited divorce, neither annuls nor dissolves the marriage contract, but simply separates the parties from bed and board, either permanently or for a limited time. (Code Civ. Pro. §§ 1762-1767.) Neither the nature nor effect of the judgment of divorce granted by the court in Illinois, in favor of David Van Cleaf against the plaintiff, appears in the record before us, except that the bond of marriage between them is stated to have been dissolved upon the ground that she had wilfully deserted, and absented herself from her husband without reasonable cause for the space of more than two years prior to the commencement of the action. It does not even appear that the decree would have the effect upon her right to dower in the state where it was rendered that is claimed for it here. Apparently it simply dissolved the marriage relation, and whether it had any effect by retroaction upon property rights existing at its date, is not disclosed. A judgment of a sister state can have no greater effect here than belongs to it in the state where it was rendered. (*Suydam v. Barber*, 18 N. Y. 468.) There is no presumption that the statutes of the state of Illinois agree with our own in relation to this subject. (*Cutler v. Wright*, 22 N. Y. 472; *McCulloch v. Norwood*, 58 id. 562.) If they do, the fact should have been proved, as our courts will not take judicial notice of the statutes of another state. (*Hosford v. Nichols*, 1 Paige, 220; *Chanoine v. Fowler*, 3 Wend. 173; *Sheldon v. Hopkins*, 7 id. 435; Wharton on Evidence, §§ 288, 300.) Adequate force can be given to the Illinois judgment by recognizing its effect upon the *status* of the parties thereto, without giving it the effect contended for by the respondent. (*Barrett v. Failing*, 111 U. S. 523; *Mansfield v. McIntyre*, 10 Ohio, 27.)

The judgment appealed from, therefore, can be affirmed only upon the ground that a decree dissolving the marriage tie,

Opinion of the Court, per VANN, J.

rendered in another state for a cause not regarded as adequate by our law, has the same effect upon dower rights in this state as if it had been rendered by our own courts adjudging the party proceeded against guilty of adultery. This would involve as a result, that the expression "misconduct of the wife" as used in the Revised Statutes, means any misconduct, however trifling, that by the law of any state is a ground for divorce. Thus it might happen that a wife, who resided in this state and lived in strict obedience to its laws, might be deprived of her right to dower in lands in this state by a foreign judgment of divorce based upon an act that was not a violation of any law of the state of her residence. It is important, therefore, to determine whether the provision that a wife shall not be endowed, in case of divorce dissolving the marriage contract for her misconduct, refers only to that act which is misconduct authorizing a divorce in this state, or to any act which may be termed misconduct and converted into a cause of divorce by the Legislature of any state.

In *Shiffer v. Pruden* (54 N. Y. 47, 49), this court, referring to said provision of the Revised Statutes, said that "the misconduct there spoken of must be her adultery, for there is no other cause for a divorce dissolving the marriage contract." It had before said, in *Pitts v. Pitts* (52 N. Y. 593), that "a wife can only be barred of dower by a conviction of adultery in an action for divorce and by the judgment of the court in such action." While these remarks were not essential to the decision of the cases then under consideration, they suggest the real meaning and proper application of the word misconduct as used in the Revised Statutes with reference to its effect upon dower.

When the Legislature said, in the chapter relating to dower, that a wife should not be endowed when divorced for her own misconduct, and, in the chapter relating to divorce, that she should not be entitled to dower when convicted of adultery, the sole ground for a divorce, we think that by misconduct adultery only was meant, or that kind of misconduct which our laws recognize as sufficient to authorize a divorce. The

Opinion of the Court, per VANN, J.

sections relating to dower and to the effect of divorce upon dower are *in pari materia* and should be construed together, and when thus construed they lead to the result already indicated. (*Beebe v. Estabrook*, 79 N. Y. 246, 252.) The repeal of section 48, which provided that the wife, if convicted of adultery, should not be entitled to dower, has not changed the result, as sections 1756 and 1760 of the Code have been substituted, leaving the law unchanged. They enact, in effect, that when judgment is rendered, at the suit of the husband, dissolving the marriage for the adultery of the wife, she shall not be entitled to dower in any of his real property. There is no change in meaning and the slight change in language, as the commissioners of revision reported, was to consolidate and harmonize the new statute with the existing system of procedure. (Throop's Annotated Code, § 1760, note.)

The repealed section was pronounced in *In re Ensign* (103 N. Y. 284), "An unnecessary and superfluous provision as respects dower." It was also held in that case that while the relation of husband and wife, both actual and legal, is utterly destroyed by a judgment of divorce so that no future rights can thereafter arise from it, still, existing rights, already vested, are not thereby forfeited, and are taken away only by special enactment as a punishment for wrong. It follows that depriving a woman of her right to dower is a punishment for a wrongful act perpetrated by her. Is it probable that the Legislature intended to punish as a wrong that which it had not declared to be a wrong? If a divorce granted in another state for wilful desertion, relates back so as to affect, by way of punishment, property rights previously acquired, must not a divorce for incompatibility of temper or any other frivolous reason be attended with the same result? Does the penalty inflicted upon the guilty party to a divorce granted in this state for a single and special reason, attach to any judgment for divorce, granted in any state for any cause whatever, including, as is said to be the law in one state, the mere discretion of the court?

Our conclusion is that as nothing except adultery is, in this

Statement of case.

state, regarded as misconduct with reference to the subject of absolute divorce, no other misconduct is here permitted to deprive a wife of existing dower rights, even if it is the basis of a judgment of divorce lawfully rendered in another state, unless it expressly appears that such judgment has that effect in the jurisdiction where it was rendered, and as to that we express no opinion.

The judgment should be reversed and a new trial granted, with costs to abide the event.

All concur, except FOLLETT, Ch. J., dissenting.

Judgment reversed.

JOHN H. LEHR, Respondent, v. THE STEINWAY AND HUNTERS
POINT RAILROAD COMPANY, Appellant.

The exposure of a passenger to danger, which the exercise of a reasonable foresight would have anticipated and due care avoided, is negligence on the part of a carrier.

It may not be held, as matter of law, that the exercise of a reasonable foresight will not lead a street railway company to anticipate that overcrowding of its cars and their platforms will render accidents to passengers probable; but the question whether it is chargeable with negligence in permitting such overcrowding, is one of fact.

So, also, it may not be held, as matter of law, that a passenger surrendering his seat when the car is crowded to one less able to stand than himself, contributes to an injury caused by the company's negligence.

Plaintiff with his wife took passage on one of defendant's cars; as more people were waiting to take the car than it could carry, plaintiff pressed forward to procure a seat for his wife, who by reason of an injury was unable to stand, and when she entered gave the seat to her; he passed out to the rear platform, and this being crowded, stepped from the car and went to the front platform, where there appeared to be more standing room; he found it crowded, however, and so took a position on the steps holding on to the rail on either side. After riding thus a short distance, a movement of the passengers on the platform caused him to lose his hold; he fell under the car and was injured. In an action to recover damages, it was not shown or claimed that any person, wilfully or intentionally, crowded plaintiff from his position. *Held*, that the question of defendant's negligence and contributory negligence on the part of plaintiff, were properly submitted to the jury.

Putnam v. B. & S. A. R. R. Co. (55 N. Y. 108), distinguished.

(Argued January 27, 1890; decided February 25, 1890.)

118	556
149	841
18	556
73	569
73	569
73	575

Statement of case.

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made May 11, 1887, which affirmed a judgment in favor of plaintiff entered upon a verdict, and affirmed an order denying a motion to set aside a verdict and for a new trial.

This action was brought to recover damages for injuries alleged to have been caused by defendant's negligence.

The material facts are stated in the opinion.

George W. Wingate for appellant. There was no negligence proved on the part of the defendant company. (Penal Code, § 426; *Putnam v. B. & S. A. Co.*, 55 N. Y. 108; *P. F. W. & C. R. R. Co.*, 42 Hun, 104; *Lyle v. W. R. R. Co.*, 6 N. Y. Supp. 325; *Felton v. C. R. R. Co.*, 34 Alb. L. Jur. 453; *Clark v. E. A. R. R. Co.*, 36 N. Y. 135; *Bowen v. N. Y. C. R. R. Co.*, 18 id. 408; *McPadden v. N. Y. C. R. R. Co.*, 44 id. 478.) The plaintiff was guilty of contributory negligence. (*Halpin v. T. A. R. R. Co.*, 8 J. & S. 183; *Deyo v. N. Y. C. R. R. Co.*, 34 N. Y. 9; *Boitton v. H. R. R. R. Co.*, 18 id. 248; *Wilds v. H. R. R. R. Co.*, 24 id. 430; *Grippin v. N. Y. C. & H. R. R. R. Co.*, 40 id. 51; *Dun v. S. & R. R. R. Co.*, 78 Va. 663; *Searle v. M. E. R. R. Co.*, 101 N. Y. 661; *Banks v. N. Y. & H. R. R. Co.*, 59 id. 357; *Hayes v. Forty-second St. R. R. Co.*, 97 id. 259; *Coleman v. S. A. R. R. Co.*, 114 id. 609, 612, 613; *Webster v. R. W. & O. R. R. Co.*, 115 id. 112, 115; *Treguer v. D. D. R. R. Co.*, 14 Abb. Pr. [N. S.] 49; *Phillips v. R. & S. R. R. Co.*, 49 N. Y. 180; *Clark v. E. A. R. R. Co.*, 36 id. 135; *Ward v. C. P. R. R. Co.*, 11 Abb. Pr. [N. S.] 411; *Solomon v. C. P. R. R. Co.*, 1 Sweeny, 295; *Solomon v. M. R. R. Co.*, 13 Abb. [N. S.] 200; 35 Alb. L. J. 95; *Hunter v. C. & S. V. R. R. Co.*, 112 N. Y. 371; *Hickey v. B. & L. R. R. Co.*, 14 Allen, 429; *Todd v. O. C. R. R. Co.*, 7 id. 207; *P. & R. I. R. R. Co. v. Lane*, 5 Wkly. Dig. 404; *C. R. R. Co. v. Rutherford*, 29 Ind. 85; *Holbrook v. U. & S. R. R. Co.*, 12 N. Y. 236; *P. & C. R. R. Co. v. McClurg*, 56 Penn. St. 294; *C. R. Co. v. Peacock*, 69 Md. 264; *Weiler v. M. R. Co.*, 53 Hun, 374; *Remer v. L. I. R.*

Statement of case.

R. Co., 48 id. 352; *Larmore v. C. P. I. Co.*, 101 N. Y. 391; *Nicholson v. E. R. Co.*, 41 id. 533; *Miller v. Woodward*, 104 id. 471, 477; *Splitstorff v. State*, 108 id. 214, 216.) The court should have granted the motion to dismiss the complaint made when the plaintiff rested, and the motion to direct a verdict for the defendant made at the close of the trial. (*Dwight v. G. L. Ins. Co.*, 103 N. Y. 343; *People v. Cook*, 8 id. 67; *Baulec v. N. Y. & H. R. R. Co.*, 59 id. 366; *I. Co. v. Munson*, 14 Wall. 442; *Putnam v. B. & S. A. R. R. Co.*, 55 N. Y. 108; *Black v. B. C. R. R. Co.*, 108 id. 640; Laws of 1850, chap. 140, § 46; *Nolan v. B. C. & N. R. R. Co.*, 87 N. Y. 63; *Clark v. E. A. R. R. Co.*, 36 id. 135; *Sheridan v. B. & N. R. R. Co.*, Id. 39; *Willis v. L. & B. R. R.*, 129 Mass. 351; *Hebbard v. N. Y. & E. R. R.*, 15 N. Y. 455. *Townsend v. N. Y. & H. R. R. R. Co.*, 56 id. 300.)

Louis S. Phillips for respondent. This court cannot review the facts on this appeal. (*Hazman v. H. L., etc., Co.*, 50 N. Y. 53; *Maher v. C. P., etc., R. Co.*, 67 id. 52, 55; *Boos v. Ins. Co.*, 64 id. 236; *T. A. R. R. Co. v. Ebling*, 100 id. 98, 101; *Coakley v. Mahar*, 36 Hun, 157, 159; Code Civ. Pro. § 767; *Hinman v. Stilwell*, 34 Hun, 178; *Sheridan v. B. C. R. R. Co.*, 36 N. Y. 39; Baylies' Tr. Pr. 229.) Plaintiff did not contribute to the injury by riding upon the front platform. (*Stackus v. N. Y. C. & H. R. R. R. Co.*, 79 N. Y. 464; *Kain v. Smith*, 89 id. 375; *Ochsenbein v. Shapley*, 85 id. 214, 224; *G. P. R. Co. v. Walling*, 97 Penn. St. 55; *Musel v. L. & B. R. R. Co.*, 8 Allen, 234; *McGuire v. M. R. R. Co.*, 115 Mass. 239; *Burns v. B. R. Co.*, 50 Mo. 139; *W. C. & P. R. R. Co. v. McElwee*, 17 P. F. Smith, 311; *Clark v. E. A. R. R. Co.*, 36 N. Y. 135; *Spooner v. B. C. R. R. Co.*, 54 id. 230; *Nolan v. B. C. & N. R. R. Co.*, 87 id. 63; *Dixon v. B. C. & N. R. R. Co.*, 100 id. 178; *Werle v. L. I. R. R. Co.*, 98 id. 650; *Ginna v. S. A. R. R. Co.*, 67 id. 596; 8 Hun, 494; *Willis v. L. I. R. R. Co.*, 34 id. 670, 677; *Colgrove v. N. H., etc., R. R. Co.*, 20 N. Y. 492; *Merwin v. Manhattan Ry. Co.*, 48 Hun, 608; *Coleman v. S. A.*

Opinion of the Court, per FOLLETT

R. R. Co., 114 N. Y. 609.) There was which the jury could infer that the negligence causing the injury to plaintiff *R. R. Co.*, 38 N. Y. 49; *Payne v. T. & 572*; *Nolan v. B. C. R. R. Co.*, 87 N. Y. Torts, 645; *Putnam v. R. R. Co.*, 55 N. Y. *R. Co.*, 131 Mass. 371; *Schneider v. B. C. R. R. Co.*, 121; *Sheridan v. B. C. R. R. Co.* Defendant is not excusable, because the persons contributed concurrently with the negligence to plaintiff's injuries. (*Webster v. R. R. Co.*, N. Y. 260; *Clark v. E. A. R. R. Co.*, 36 N. Y. *Idan v. B., etc., R. R. Co.*, Id. 49; *Spoole v. R. R. Co.*, 54 id. 230; *Simmons v. N. B., etc., R. R. Co.*, 361; *Merwin v. M. R. Co.*, 48 Hun, 608. Defendant is not liable for plaintiff's injuries, by being placed in its car pursuant to laws of 1850 c. 46. (*Willis v. L. I. R. R. Co.*, 34 N. Y. *Nolan v. R. R. Co.*, 87 id. 63; *Hayes v. R. R. Co.*, 407; *Hayes v. R. R. Co.*, 97 N. Y. Whether plaintiff erred in his judgment, whether he have avoided the accident by any greater care than he exercised, was one for the jury to decide. (*R. R. Co.*, 102 N. Y. 721, 723.) The assignment of the charge to the jury. (*Bowen v. R. R. Co.*, 18 N. Y. 408, 410; *Clark v. E. A. R. R. Co.*, 137; *Coddington v. R. R. Co.*, 102 id. 6; *R. R. Co.*, 69 id. 195; *Dixon v. R. R. Co.*,

FOLLETT, Ch. J. In 1886 the defendant operated with horses a street railroad, extending from 12th Street to Peter's Point, eastwardly through Long Island City. On the afternoon of the 1st of March, 1886, the plaintiff, accompanied by his wife, who was seven years old, and her father, stood waiting at the western end of defendant's line) to take the car for Beach, a pleasure resort on the line of

Opinion of the Court, per FOLLETT, Ch. J.

sons were waiting for a car than could be carried. A car approached from the east, and as soon as its passengers were discharged the plaintiff pressed forward and secured a seat for the purpose of giving it to his wife, who, by reason of an injury, was unable to stand and sustain herself by grasping a rod or strap. When his wife entered the car he gave his seat to her, and she took and carried the girl on her lap until the plaintiff was injured. The plaintiff remained standing by his wife until their fares were collected. His friend, the father of the girl, found standing-room on the front platform, where he rode until after the accident. After the plaintiff had paid the fares, he made his way to the right side of the rear platform, where he rode for awhile, and afterward stood on one of the steps, steadying himself by holding onto the hand rail. This platform and the steps being crowded with passengers, and the plaintiff seeing that there was more standing-room on the front platform, stepped from the moving car and walked rapidly by the right side of it to the front platform, for the purpose of securing a better place to stand. This platform was so crowded that the plaintiff was unable to fully accomplish his purpose, but he boarded the car in safety, and stood with his left foot on the step and his right foot on the platform, and clung with his right hand to the rail of the dasher, and with his left hand to the hand-rail at the end of the body of the car. After riding in this position for a short distance, a movement of the passengers on the platform broke the hold of his right hand, which he was unable to regain, and thereupon he was forced by the pressure of the crowd from the steps, and fell underneath the car, the wheels of which passed over and crushed his left leg, rendering amputation at the knee necessary. Before the plaintiff left the rear platform he asked the conductor to stop the car so that he might go to the front platform, but, receiving no reply, he, the conductor and one Norton stepped from the rear platform at about the same time, and walked by the side of the car for the purpose of reaching the front platform. His action and disclosed purpose were not objected to by the conductor or driver.

After the plaintiff lost the support of his right hand, and before he fell, he called to the driver to stop the car, but he did not until the car had passed over him. There is some evidence that the front platform was so crowded that the driver could not readily and effectually operate the brake. These are the essential facts upon which the plaintiff bases his right to recover, and this court must regard them as established by the verdict.

The defendant moved for a non-suit on the grounds that the plaintiff had failed to establish that defendant negligently caused the accident, and that he had not affirmatively shown that he did not negligently contribute to the accident. The motion was denied and the defendant excepted. The court ruled that there was no evidence that the road or car was defective, or that the defendant negligently employed an unskillful or incompetent conductor or driver; but instructed the jury that if they found that the defendant negligently permitted the car to be overloaded, and that the overloading caused the accident, the plaintiff could recover unless the accident was caused in part by some negligent act of his which was a contributing cause of the accident. The exposure of a passenger to a danger which the exercise of reasonable foresight would have anticipated and due care avoided, is negligence on a part of a carrier. It clearly appears that the defendant undertook to carry more passengers than could sit and stand within the car, and that both platforms and their steps were filled to their utmost capacity. The action of persons so crowded together, and the great force which they exercise, sometimes almost unconsciously on each other, is understood by carriers of passengers and their employees, and the court would not have been justified in non-suiting the plaintiff and holding, as a matter of law, that the exercise of reasonable foresight would not have led the defendant to anticipate that overcrowding this car and its platforms might render accidents like the one which befel the plaintiff probable. Whether the defendant was negligent in carrying so many passengers was a question of fact for the jury.

Opinion of the Court, per FOLLETT, Ch. J.

The court properly refused to instruct the jury that the plaintiff was negligent in surrendering his seat to his wife and seeking a place on the platform. It cannot be held, as a matter of law, that a passenger surrendering his seat to one less able to stand than himself, contributes to an injury caused by the carrier's negligence, but which would not have been received had he remained in his seat.

The evidence in respect to the speed of the car, and the circumstances under which the plaintiff attempted to enter on the front platform, would not have justified the court in ruling, as a matter of law, that the plaintiff contributed to his own injury by making the attempt, but properly left it, as a question of fact, for the jury.

Whether the plaintiff was crowded from his position by persons entering on the opposite side of the front platform for the purpose of being carried, or by some movement of those whose fares had been collected, does not very clearly appear. It is not asserted that any person willfully or intentionally crowded the plaintiff from his position, and *Putnam v. Broadway and Seventh Avenue Railroad Company* (55 N. Y. 108), and kindred cases, are not in point. The defendant made no attempt to show that persons entered on the car against the wish or protest of the conductor or driver, or that the rules of the defendant required that the car should not be overloaded, or that the conductor or driver made any attempt to prevent the car from being unduly crowded.

Whether the defendant negligently caused the injury to the plaintiff, and whether he negligently contributed to his own injury were, under the evidence, questions of fact for the jury; and finding no error in the submission of the case, the judgment should be affirmed, with costs.

All concur, except BROWN J., not sitting.

Judgment affirmed.

Statement of case.

ELIZABETH A. L. HYATT, Appellant, v. CYRUS CLARK,
Respondent,

CYRUS CLARK, Respondent, v. ELIZABETH A. L. HYATT,
Appellant.

118	563
120	518
118	563
130	106
130	219

118	563
151	9
118	563
154	729

One S., who had a general power of attorney under seal from H., who was in Europe, to manage her property and affairs and to sell, convey and assign any portion of her real estate, entered into an agreement with C. to lease to him certain of the real estate for the term of five years, with the privilege of renewal for another like term, C. to make certain improvements on the premises. A lease was drawn up and executed by S., as agent for H., and handed to C., but as he questioned the authority of S., it was understood the acceptance thereof should await an answer from H. to a request for authority to execute it. Her answer, however, was a denial of the request and a cancellation of the power of attorney. S. showed the answer to C. and requested him to cancel the lease; this he refused to do and took possession of the premises. S. did not report to H. that the delivery of the lease was conditional, but informed her it was valid and could not be cancelled. She accepted the rent reserved by the lease until nearly the end of the original term, and saw improvements being made upon the premises by C. Upon his demanding a renewal of the lease, she was informed by S. of the conditional acceptance, and thereupon she refused subsequent payment of rent and refused to renew. *Held*, that in the absence of any claim of bad faith or collusion between S. and C., by the acceptance of the rent, H. ratified the lease, and so was bound by its terms; and this without regard to the question as to the authority of S. to execute, or as to the conditional delivery; that if S. had no authority H. was chargeable with knowledge of her right to disaffirm, whether any agreement to that effect had been made or not; that if S. had authority she was chargeable with and conclusively presumed to have acted upon the knowledge possessed by him that the delivery was conditional; and that, therefore, in either case, having received the benefits of the contract she could not after so long acquiescence disaffirm it, and so it was irrevocable.

Reported below, 23 J. & S. 98.

Argued January 31, 1890; decided February 25, 1890.

APPEALS by Elizabeth A. L. Hyatt from two several orders of the General Term of the Superior Court in the city of New York made June 23, 1887, which respectively reversed separate judgments in her favor entered upon the decision of the court on trial at Special Term.

Statement of case.

These are cross-actions between the same parties, tried together and submitted upon the same evidence. The findings are the same in each, except as to matters purely formal. The action brought by Mr. Clark was for the specific performance of a clause in a lease between the parties, which provided for the renewal thereof upon the expiration of the first term of five years. The action brought by Mrs. Hyatt was to annul and cancel said lease upon the ground that her agent had exceeded his authority in executing and delivering it.

On the 2d of January, 1880, Mrs. Hyatt, who was then in England, appointed her brother, Arthur Lake, her agent to manage and conduct her property and affairs in the United States; to sell and dispose of all or any part of her real or personal estate; to convey and assign the same to the purchaser or purchasers thereof; to receive and recover all sums of money due or to become due to her, and to sign, seal and execute all such agreements, conveyances, assurances, acts, deeds, matters and things as should be required. The appointment was by a written instrument, duly signed, sealed and acknowledged.

About January 15, 1880, negotiations were begun between Mr. Clark and Mr. Lake in relation to a lease of certain premises belonging to Mrs. Hyatt, known as No. 25 Waverly place, in the city of New York. Clark raised the question whether Lake was authorized by said power of attorney to give a lease, and wished him to cable for additional authority, but he did not do so, as he had written to Mrs. Hyatt about the offer made and his letter was about due. Pending an answer to his letter, and about January twenty-ninth, the lease in question was signed by Lake as attorney for Mrs. Hyatt, the lessor, and by Clark and one Gardner, as lessees. Lake then handed the lease to Clark, for himself and Gardner, but, as the court found, "Clark did not accept the delivery of the lease, but postponed his decision as to accepting or not accepting until he should hear further from" Mrs. Hyatt. On the seventh of February, Mrs. Hyatt sent a cable message to Lake, in these words: "Your powers attorney cancelled. Sign no lease."

Statement of case.

In a day or two Lake showed this mes-
saged requested him to cancel "the matter of 1
so far as the same had proceeded," but he
he would take any risk there might be.
his lease for record and took possession of 1
did not report to his sister that the lease h
in any sense conditionally, or that Clark
delivery before the receipt of the message,
her that it was signed January twenty-nint
and that it could not be cancelled or avo
did not know that there had been any c
with the delivery of the lease until Noveml
she heard of it through Lake. In the r
accepted the rent reserved by the lease as
quarterly payments, the first payment havin
1, 1880. The lease provided for an annua
for five years, with the right of renewal for
term of five years each, at \$2,500 per year
and \$3,500 per year during the latter. T
expend not less than \$2,000 during the 1
improving the premises, and they, in fac
than \$4,000 for that purpose.

Before the commencement of this litiga
first acquired all of Gardner's interest in
notice of his election to continue as tenan
of five years.

Further facts appear in the opinion.

William Man for appellant. This c
questions of law only, and will consider
Term has, at the request of Mr. Clark,
exceptions on matters of fact, and that it a
judge as to the facts, thus concluding any
of matters of fact. (Code, § 1338; *R. Co*
378; *Van Tassel v. Wood*, 76 id. 614; *L*
id. 620; *Ward v. Craig*, Id. 550, 557.) Th
did not authorize the making of any le

Statement of case.

Peterson, 72 N. Y. 279, 284; *Geiger v. Bolles*, 1 T. & C. 129; *Filley v. Gilman*, 2 J. & S. 339; *Taylor v. Hoey*, 26 id. 402; *Wood v. Goodridge*, 6 Cush. 117; *Hubbard v. Elmer*, 7 Wend. 446; *Mechem on Agency*, § 306; *Rossiter v. Rossiter*, 8 Wend. 495; *Jeffrey v. Hursh*, 49 Mich. 31.) There has been no ratification of the lease by Mrs. Hyatt. (Story on Agency, § 329; *Price v. Keys*, 1 Hun, 177; 62 N. Y. 378; *Hoffman v. Tredwell*, 2 T. & C. 57; *Nixon v. Palmer*, 8 N. Y. 398; *Seymour v. Wyckoff*, 10 id. 213; *Stillwell v. M. L. Ins. Co.*, 72 id. 385; *Pitch v. Smith*, 82 id. 627; *Benninghoff v. A. Ins. Co.*, 93 id. 495; *Craighead v. Peterson*, 72 id. 285.) The letter of Yeaman, which was offered in evidence, was clearly competent. (*Merrill v. I. R. R. Co.*, 16 Wend. 597; *Bank of Monroe v. Culver*, 2 Hill, 531; *Halsey v. Sinsebaugh*, 15 N. Y. 485; *Russell v. H. R. Co.*, 17 id. 134; *Guy v. Mead*, 22 id. 466; *Cole v. Jessup*, 10 id. 96; *Maulerille v. Reynolds*, 68 id. 538; *Stephens on Ev.*, 237, art. 136, note.) Parol evidence is always admissible to explain and qualify the delivery of a deed, or any other instrument in writing, even where it has been delivered by the grantor to the grantee. (*Gilbert v. N. A. F. Ins. Co.*, 23 Wend. 43; *Cocks v. Baker*, 49 N. Y. 107; *Jackson v. Perkins*, 2 Wend. 308; *Ford v. James*, 2 Abb. Ct. App. Dec. 159; *Graves v. Dudley*, 20 N. Y. 77; *Fonda v. Sage*, 48 id. 173; *Reynolds v. Robinson*, 110 id. 654; *Greenl. on Ev.* 297; *Brackett v. Barney*, 28 N. Y. 333, 340, 341; *Crosby v. Hillyer* 24 Wend. 284; *Jackson v. Richards*, 15 id. 617.) There is nothing in this case upon which to found an argument that there is an estoppel against Mrs. Hyatt on the ground that it was the deceit of her own agent that injured her. (*People v. Bostwick*, 32 N. Y. 445.)

Joseph H. Choate and *Sanger & Davis* for respondent. If Mr. Lake had no authority under the original power to execute the lease, nevertheless Mrs. Hyatt ratified the act of her agent in executing that instrument. (Whart. on Agency, § 225; Story on Agency, §§ 79, 80, 140; *Adams v. Mills*, 60

Opinion of the Court, per VANN, J.

N. Y. 533, 539; *Stilwell v. M. L. Ins. Co.*, 72 id. 385, 392; 2 Kent's Comm. 801; Story on Agency, § 256; *Griswold v. Haven*, 25 N. Y. 595; *N. Y., etc., R. R. Co. v. Schuler*, 34 id. 30; *Myers v. M. L. Ins. Co.*, 99 id. 1, 11; *Meehan v. Forrester*, 52 id. 279; Whart. on Agency, § 92; Story on Agency, § 239.) The delivery of the lease to Mr. Clark was an absolute delivery as far as Mrs. Hyatt was concerned. The right was reserved to Mr. Clark, only, to refuse to accept it. (*Townson v. Tokel*, 3 B. & Ald. 36.) The power of attorney given to Mr. Lake empowered him to execute the lease. (*Hedges v. Riker*, 5 Johns. Ch. 163; *U. S. v. Gratiot*, 14 Pet. 526; *Craighead v. Peterson*, 72 N. Y. 279, 283; Story on Agency, § 140; *Adams v. Mills*, 60 N. Y. 539; *Myers v. M. L. Ins. Co.*, 32 Hun, 321; 99 N. Y. 1.)

VANN, J. We do not deem it important to decide whether the power of attorney authorized Mr. Lake to execute the lease in question or not, because, in either event, the same result must follow, under the circumstances of this case.

If, on the one hand, he acted without adequate authority in giving the lease, both the lessor and lessee knew it, for both knew the facts and both are presumed to have known the law, and the former, at least, had an absolute right to disaffirm the contract. As she knew the contents of the power of attorney and the lease, and that the latter was executed by her agent in her name, it was not necessary that she should be informed of the legal effect of those facts. (*Kelley v. Newburyport & Amesbury Horse R. R. Co.*, 141 Mass. 496; *Phosphate Lime Co. v. Green*, L. R. [7 C. P.] 43; *Mechem on Agency*, § 129.)

Whether influenced by caprice or reason, if she had promptly notified the lessees that she repudiated the lease because her agent had no power to execute it, their rights would have been forthwith terminated and they would have had no lease. The right to disaffirm on one tenable ground, would, if acted upon have been as effective as the right to disaffirm upon all possible grounds. Under the condition supposed, the law

Opinion of the Court, per VANN, J.

gave her the same right to disaffirm without any agreement to that effect, that she would have had if her agent, being duly authorized to lease, had expressly provided, in the written instrument, that she could disaffirm, if she chose to do so. Therefore, by accepting the rent of the demised premises for more than four years without protest or objection, she ratified the lease as completely as she could have, if she had known of two grounds upon which to disaffirm, instead of only one. Two grounds could not make the right any more effectual than one. If she had the right at all, the number of grounds upon which she could justify its exercise is unimportant. Her ratification was none the less complete, because, being unwilling to run the risk of a doubtful question of law, she did not at once act as she would have acted if she had known all of the facts. As said by the court in *Adams v. Mills* (60 N. Y. 539), "the law holds that she was bound to know what authority her agent actually had." Having executed the power of attorney, she is conclusively presumed to have known what it meant and the extent of the authority that it conferred. (Best on Ev. 123; Whart. on Ev. § 1241.)

If the lease was *ultra vires*, therefore, by ratifying it, she in legal effect executed and delivered it herself, and whatever was said between Lake and Clark, became immaterial. Even if they agreed that she should have the right to disapprove, it is of no importance, because she had that right without any such agreement. If her agent had no power to execute the lease, the delivery thereof, whether absolute or conditional, could not affect her rights. If she was dissatisfied with it, she could have been relieved of all responsibility thereunder by promptly saying to the lessees: "This contract was not authorized by the agency I created, and I refuse to be bound by it." After that there would have been no lease. If the action of her agent was unauthorized, it did not bind her, until by some act of ratification she bound herself. By ratifying, she waived any right to disaffirm upon any ground, known or unknown, because the lease did not exist, as a lease, by the act of her agent, but by her own act of confirmation.

Opinion of the Court, per VANN, J.

If, on the other hand, Mr. Lake was duly authorized to give the lease, certain presumptions of controlling importance spring from that fact. He is presumed to have disclosed to his principal, within a reasonable time, all of the material facts that came to his knowledge while acting within the scope of his authority.

It is laid down in Story on Agency (§ 140), that "notice of facts to an agent is constructive notice thereof to the principal himself, where it arises from or is at the time connected with the subject-matter of his agency, for, upon general principles of public policy, it is presumed that the agent has communicated such facts to the principal, and if he has not, still the principal having intrusted the agent with the particular business, the other party has a right to deem his acts and knowledge obligatory upon the principal."

In other words, she was chargeable with all the knowledge that her agent had in the transaction of the business he had in charge. (*Ingalls v. Morgan*, 10 N. Y. 178; *Adams v. Mills*, *supra*; *Myers v. Mutual Life Ins. Co.*, 99 N. Y. 1, 11; *Bank of U. S. v. Davis*, 2 Hill, 451; *Higgins v. Armstrong*, 9 Col. 38.)

It was his duty to keep her informed of his acts and to give her timely notice of all facts and circumstances which would have enabled her to take any step that she deemed essential to her interests.

She does not question the good faith of Mr. Lake, and there is no proof of fraudulent collusion between him and Mr. Clark, who, while under no obligation to inform Mrs. Hyatt of the facts, had the right to assume that her agent had done so. (*Ingalls v. Morgan*, *supra*; *Meehan v. Forrester*, 52 N. Y. 277; *Scott v. Middletown, U. & W. G. R. R. Co.*, 86 id. 200.)

It was her duty to protect her interests by selecting an agent of adequate judgment, experience and integrity, and if she failed to do so, she must bear the loss resulting from his inexperience, negligence or mistaken zeal. After the lapse of sufficient time, therefore, she is presumed to have acted, with knowledge of all the acts of her agent, in the line of his agency.

Opinion of the Court, per VANN, J.

By accepting and retaining the rent, which was the fruit of her agent's acts, for nearly five years without objection, she is presumed to have ratified that act. (*Hoyt v. Thompson* 19 N. Y. 207; *Alexander v. Jones*, 64 Iowa, 207; *Heyn v. O'Hagan*, 60 Mich. 160; 2 Greenl. on Ev. §§ 66, 67.) Without expressing any dissatisfaction to the lessees, she received eighteen quarterly payments of rent before electing to avoid the lease. She made no offer to return any part of the rent so paid, although she tendered back the amount deposited to her credit for the nineteenth quarter at the time that she demanded possession of the premises.

Independent of what she is presumed to have known through the information of her agent, she in fact knew the terms of the lease and that it was executed by Mr. Lake in her name.

Upon her arrival in this country in September, 1880, she visited the premises and saw the additions and improvements that the tenants were making thereto, and at that time as well as subsequently, rent was paid to her in person. Apparently she had all the knowledge that she cared to have, for she made no inquiry of her agent until about six months previous to the expiration of the first term of five years, and not until after the lessees had given notice of their election to continue the lease for a second term. Thinking that the rent was low, she then tried to find out something from her agent that would enable her to avoid the lease, and as the result of her efforts in this direction, ascertained the fact upon which she bases her right to succeed in this litigation. But it was then too late for her to disaffirm, because her long silence and many acts of ratification had been relied upon by the tenants, who had expended a large sum of money in making permanent improvements upon the property. Having received the benefits of the contract, she could not, after years of acquiescence, suddenly invoke the aid of the courts to relieve her of any further obligation, because she had but recently discovered a fact that she should have ascertained, and which the law presumes that she did ascertain, long before. (1 Am. & Eng. Encyc. of Law, 429.)

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Statement of case.

This action was brought by the plaintiff to recover damages for personal injury alleged to have been received by him through the negligence of one Gebhard, a servant of the defendant.

The plaintiff was an employe of a firm of stevedores, Dick & Churchill, who had engaged with the master of the ship "Austria" to load it with barrels of petroleum which were in the store-house and upon the dock of the defendant at Weehawken, in the state of New Jersey.

The defendant possessing and owning the dock and store-house in which the barrels of petroleum were stored and from which they were to be loaded, also owned a steam engine and apparatus which was employed in loading vessels. D. contracted with Dick & Churchill to furnish the power and necessary men to run and manage it, to load the vessel. The man Gebhard had been in defendant's employment for several years; he was generally employed in other service, but owing to a strike, which deprived the defendant of the servant who usually superintended the hoisting and lowering, that duty on this occasion was assigned to Gebhard.

The stevedores furnished men to stow the cargo, and another man, who was the plaintiff in this case, to stand at the gangway and to signal (by the use of a whistle) the man who had charge of the hoisting and lowering part of the operation of loading the vessel. The theory of the plaintiff is that Gebhard, who managed the hoisting and lowering of the barrels from the dock up the sides of the vessel upon a skid and so over the hold into which it was to be loaded, raised a barrel from the dock without any signal, and after he had said to the gangman that it was dinner time, and he would raise no more before dinner, and while plaintiff, the gang-man, supposing that no more was to be done until after dinner in accordance with the statement made by said Gebhard, and while his attention was directed to calling the men from the hold to dinner, the barrel swung against him and knocked him into the hold of the vessel, by which he received the injuries complained of.

Statement of case.

The court instructed the jury that Gebhard was the servant of the defendant, and that for any negligence which he committed in hoisting or lowering the barrels in the operating the drum, the defendant is responsible as his master.

The only question discussed, and conceded upon the trial to be the only one in the case, was whether Gebhard and plaintiff were co-servants, or whether they were servants of different masters.

John Brooks Leavitt for appellant. The exception to the denial of the motion to dismiss the complaint and the exceptions to the charge that Gebhard, the drum-man, was defendant's servant, and that it was liable for his negligence in operating the drum were well taken. (*King v. N. Y. C. & H. R. R. Co.*, 66 N. Y. 181; *B. C. Co. v. Reid*, 3 Macq., 266, 283; *Stringham v. Hilton*, 111 N. Y. 188; *Johnson v. City of Boston*, 118 Mass. 114; *Ewan v. Lippencott*, 47 N. J. L. 494; *Olive v. W. M. Co.*, 103 N. Y. 300; McDonald on Master and Servant, 46.) Where a servant in the general employ of one master is by him placed temporarily under the orders of another, to do the latter's work, the servant of the latter, and the servant so placed to work with him, are fellow servants in that work, and neither master is liable for the damages resulting to one of those servants from the negligence of the other while performing the same. (*Rourke v. W. M. C. Co.*, L. R. [2 C. P. Div.] 205; *Coyle v. Pierpont*, 33 Hun, 311; *Burke v. DeCastro*, 11 id. 354; *Winterbottom v. Wright*, 10 M. & W. 109; *Murray v. Currie*, L. R. [6 C. P.] 24; *The Harold*, 21 Fed. Rep. 428; *The Islands*, 28 id. 478; *I. C. R. R. Co. v. Cox*, 21 Ill. 20; *Ewan v. Lippencott*, 47 N. J. L. 494; *Johnson v. City of Boston*, 118 Mass. 114; *Svenson v. A. M. S. S. Co.*, 57 N. Y. 108; *Abram v. Reynolds*, 5 H. & N. 142.) The drum-man was not at the time of the accident using the drum in defendant's business. (*Morris v. Brown*, 111 N. Y. 328; *Bushby v. N. Y., L. E. & W. R. R. Co.*, 107 id. 374.)

Opinion of the Court, per POTTER, J.

Abel E. Blackmar for respondent. The man Gebhard, whose negligence injured plaintiff, was the servant of the defendant, and defendant was responsible for his negligence. (*Quarman v. Burnett*, 6 M. W. 499; *Gerlach v. Edelmeier*, 15 J. & S. 292; 88 N. Y. 645; *Coyle v. Pierrepoint*, 37 Hun, 379; *Michael v. Stanton*, 3 id. 463; *Stewart v. Harvard College*, 12 Allen, 58; *Crockett v. Calvert*, 8 Ind. 127; *Sammett v. Wright*, 5 Esp. 163; *Holmes v. Onion*, 2 C. B. [N. S.] 789; *Dalzell v. Tyner*, E., B. & E. 899; *Sprout v. Hemingway*, 14 Pick. 1; *Weyant v. N. Y. C. R. R. Co.*, 3 Duer, 360.) The rule that a master is not responsible to one servant for the negligence of another, is only applicable in cases where the servant sues his own master, and, therefore, is not applicable to this case. (*Smith v. R. R. Co.*, 19 N. Y. 132; *Young v. N. Y. C. R. R. Co.*, 30 Barb. 229; *Gerlach v. Edelmeier*, 15 J. & S. 292; 88 N. Y. 645; *Svenson v. A. M. S. S. Co.*, 57 id. 108; *Abraham v. Reynolds*, 5 H. & N. 142; *Burke v. N. & W. R. R. Co.*, 34 Conn. 124; *Svenson v. N. E. R. Co.*, L. R. [3 Exch. Div.] 341; *Harold v. N. Y. C. R. R. Co.*, 13 Daly, 89; *Thompson on Negligence*, 1040, 1041; *Sullivan v. T. R. R. Co.*, 44 Hun, 304; *Warburton v. G. W. R. Co.*, L. R. [2 Exch.] 30; *Thomas v. Winchester*, 6 N. Y. 397; *Farrent v. Barnes*, 11 C. B. [N. S.] 553; *Farwell v. B. & W. R. R. Co.*, 4 Metc. 49.)

POTTER, J. I entirely agree with the charge of the trial court that they were servants of different masters. That the man who gave the signal was the servant of the stevedores Dick & Churchill, and that the man who directed the hoisting and lowering was the servant of the defendant, and that, therefore, upon well-settled principles of law, the defendant is liable for the neglect of Gebhard, the man at the drum.

The authorities cited upon the brief of counsel warrant the instruction of the judge to the jury in that regard, and especially the case cited by respondent's counsel and to be found in *Sullivan v. Tioga Railroad Company*, 44 Hun, 304, which I consider a clear and able exposition of the law which is to

Statement of case.

govern the decision of cases of this character. That case was affirmed by the Court of Appeals in 112 N. Y. 643.

The judgment should be affirmed with costs.

All concur.

Judgment affirmed.

JAMES MURPHY, as Administrator, etc., Appellant, *v.* **THE CITY OF BROOKLYN**, Respondent.

This action was brought to recover damages for the death of M., plaintiff's intestate, a boy six years old, who was found drowned in a hole along side a sewer constructed by defendant through private property and that of the state with the consent of the owner. It appeared that the sewer emptied into a bay; at high tide the sewage was driven back up the sewer, causing the cavity in question; this was about fifty feet from one of defendant's streets, along which, forming the boundary of the adjoining premises, was an embankment faced by a wall, and on top of this a fence or railing of posts and cross-bars; at a point where it was supposed the intestate went upon the premises the cross-bar was down and the wall had given away. People going to the bay had occasionally crossed there, and the ground for ten or twelve feet from the fence had the appearance of a path. It did not appear that any objection had been made by any person to the construction and maintenance of the sewer. *Held*, that no violation of any duty which the defendant owed to decedent had been shown, and so it was not liable; that as to him the construction of the sewer was not wrongful or its maintenance a nuisance; that defendant owed to him no duty of care to protect him while upon the premises, or to guard the hole, as it was not so close to the street as to make the latter unsafe.

It seems the owner of the premises could not have been charged with negligence in permitting the hole to remain.

Beck v. Carter (68 N. Y. 283), distinguished.

(Argued January 28, 1890; decided February 25, 1890.)

APPEAL from judgment of the General Term of the City Court of Brooklyn, entered upon an order affirming a judgment of said court entered upon the dismissal of the complaint.

This action was brought to recover damages for the death of John Murphy, plaintiff's intestate, alleged to have been caused by defendant's negligence.

Statement of case.

About 1869 there was built a sewer through Third avenue in the city of Brooklyn as far as Twenty-eight street; thence at a right angle and in a northerly direction into Gowanus bay. From Third avenue into the bay the sewer did not run through or along a street, but through private premises until it reached the lands under water belonging to the state, thence through it to the end. This branch was constructed of heavy planks trunked in. In July, 1882, plaintiff's intestate, a boy nearly six years old, was found drowned in a hole situate along side of the sewer. It was about three feet across and the same number of feet in depth. The case contains evidence tending to show that at high tide the sewage was driven back up the sewer, and because of the pressure forced out of the trunk, thereby creating this and other cavities, which were at times filled with water and covered with an opaque substance. The hole in question was on private lands, about fifty or sixty feet from the street. Along this street and forming the boundary of the premises was an embankment faced with a wall, upon which was erected a guard or fence consisting of two uprights from three to four feet apart connected with two cross-bars. At the point where the intestate is supposed to have gone upon the premises one of the cross-bars was down, and the wall facing the embankment had given away somewhat. For ten or twelve feet in the direction of the hole where the boy was found the ground had the appearance of a path, [and it appeared that some people had occasionally crossed these premises on their way to the shore of the bay.

Jesse Johnson for appellant. It was not necessary to prove that the boy was not negligent in getting into this hole. (*Galvin v. Mayor, etc.*, 112 N. Y. 226.) The dangerous character of the hole was very clearly made out. (*Beck v. Carter*, 68 N. Y. 283; *Larmore v. C. P. I. Co.*, 101 id. 391, 394, 395; *Jewhurst v. City of Syracuse*, 108 id. 306, 307; *Morris v. Brown*, 111 id. 328; *Bond v. Smith*, 113 id. 383.) Defendant's liability is fixed by the rule in relation to nuisances. (*Congreve v. Smith*, 18 N. Y. 79.)

Almet F. Jenks for respondent. No connection is shown between the continuation and maintenance of the sewer and the death of the intestate. (*Cordell v. N. Y. C. & H. R. R. Co.*, 75 N. Y. 330.) There is no proof of due care on the part of the intestate, or of any facts which pointed to it. (*Johnson v. H. R. R. Co.*, 20 N. Y. 66; *Wilds v. H. R. R. Co.* 24 id. 430; *Davis v. R. R. Co.*, 47 id. 400; *Reynolds v. R. R. Co.*, 58 id. 248; *Wendell v. R. R. Co.*, 91 id. 420; *Hart v. H. R. B. Co.*, 84 id. 62; *Riceman v. Havemeyer*, 84 id. 647; *Bond v. Smith*, 113 id. 378; *Cordell v. N. Y. C. & H. R. R. Co.*, 75 id. 330; *Dubois v. Kingston*, 102 id. 219.) There was no liability on the part of the city in any event. (*McAlpin v. Powell*, 70 N. Y. 126; *Hargreaves v. Deacon*, 25 Mich. 1; *Stone v. Jackson*, 32 L. & Eq. 349; *Larmore v. C. P. I. Co.*, 101 N. Y. 391; *Blyth v. Topham*, Cro. Jac., 158; *Bush v. Brainard*, 1 Cow. 78; *Howland v. Vincent*, 10 Met. 378; *Hounsell v. Smith*, 7 C. B. [N. S.] 731; *Buiks v. South Yorksh.*, 3 B. & S. 244; *Hardcastle v. South Yorksh.*, 4 H. & N. 67; *Gramlich v. Wurst*, 86 Penn. St. 74; *Comm. v. Wilmington*, 105 Mass. 599; *Adams v. Natick*, 13 Allen, 429; *Murphy v. Gloucester*, 105 Mass. 470; *Puffer v. Orange*, 122 id. 389; *Chapman v. Cook*, 10 R. I. 304; *Green v. Bridge Creek*, 38 Wis. 449; *Morgan v. Hollowell*, 57 Me. 375.)

PARKER, J. There is no injury, in a legal sense, which can give a right of action unless it is occasioned by a violation of some duty owing to the injured.

The plaintiff claims that the defendant must be chargeable with having violated its duty to his intestate and the public upon one of two grounds:

First. Because it had constructed and was maintaining a nuisance. Second. That it was negligent in permitting the hole to remain.

From Third avenue out into the bay the sewer ran through either private property or that of the state.

It does not appear but that it was constructed with the consent of both the individual owner and the state.

Opinion of the Court, per PARKER, J.

No objection is shown to have been made by any person, either to its location, building or maintenance.

Its construction, therefore, was not wrongful as to the intestate. It did not encroach upon his property or personal rights. As to him, therefore, it was not a nuisance. (98 N. Y. 642.) Was defendant negligent in permitting the creation and continuance of the hole in which the intestate is supposed to have lost his life? That involves this legal question: Did the defendant's duty require the exercise of any care to protect him while upon these premises?

The defendant municipality is burdened with the obligation to keep the streets and highways within its limits in a safe condition for public travel. If it neglect its duty in such respect, thereby is created a liability to make good all damages sustained because of it.

The duty of keeping the street in repair has long been held to include the erection of a guard when, because of embankment or from other circumstances, the roadway is rendered dangerous.

But outside of the boundaries of the street, and upon private lands, its relations to the public are governed and controlled by the same principles as are applied to individuals or domestic corporations, and none other.

It has been held that where an owner makes an excavation upon his own land, but so near to the highway as to render travel thereon dangerous, and fails to guard it, he is chargeable with the damages sustained by one who is free from fault. (*Beck v. Carter*, 68 N. Y. 283.) It may be that in such a case a municipality having notice of the continuance of the excavation would be liable because of a failure to erect a guard at the boundary of the street so as to make the roadway safe.

As a general rule, however, the owner has a right to make such use of his land as he pleases, and in the absence of special circumstances of which *Beck v. Carter* (*supra*) furnishes an illustration, the owner is not liable for injuries sustained by one who goes upon his land even though permission to cross the premises be given. In such case the licensee takes the

risk of accidents resulting from the use of the premises in the condition in which he finds them.

There is an exception to this general rule. Where the owner expressly or by implication invites an individual or the public to come upon his land, he is liable to respond in damages to one who accepting the invitation is injured by pit-falls or snares maintained upon the premises.

Now it could not be seriously contended that had the owner been in the sole possession and occupation of the lands in question, and had permitted to exist or by his own act had created the hole in question, that he would have been chargeable in damages because of the death of the plaintiff's intestate who unbidden came upon his lands. Liability could not be predicated upon the rule laid down in *Beck v. Carter (supra)*, and kindred cases, because the hole or excavation was neither adjacent to the highway, nor so close as to make the highway unsafe or dangerous. On the contrary, it was from fifty to sixty feet therefrom and separated by an embankment faced with a wall and surmounted by a fence. Neither is it pretended that the owner had expressly or by implication invited the intestate or the public to go upon his premises. True, the evidence tends to show that one of the cross-bars was down at the place where plaintiff's intestate entered upon the lands in question, and that for some ten or twelve feet, in the direction of the hole, which was from fifty to sixty feet away, there appeared to be a trail or path indicating that others had been accustomed to walk over it. And if we assume that divers persons had been accustomed to go upon the land and cross over it to the shores of the bay without objection, that fact did not devolve upon the owner the duty of protecting such trespassers, or, at most, licensees from injury. Clearly the owner would not be chargeable with negligence in permitting the hole complained of to remain.

That which it was lawful for him to do upon his own lands he could permit another to do. It matters not whether that other be an individual or a municipal corporation. The owner under the circumstances proven owed no duty to the public in

Statement of case.

respect to this hole. No more did the occupant who created it with the consent of the owner.

The defendant is not, therefore, chargeable with negligence in permitting its continuance.

This conclusion is in accord with the views expressed by Judge EARL on a prior review. (98 N. Y. 642.)

The judgment should be affirmed.

All concur, except HAIGHT, J., not sitting.

Judgment affirmed.

NEWCOMB C. BARNEY et al., Respondents, v. JOHN M.
FORBES, JR., Appellant.

Plaintiffs, who held certain bonds as collateral for a debt due them from M., received an inclosure sent by defendant, who was a member of the firm of D. & Co., containing a letter from M. to the effect that he had accepted a position in the house of R. & Co., and pledging a portion of his salary each year until the debt was paid; also asking that "with this assurance and the letter inclosed, the bonds be released." The letter referred to, which was also inclosed, was from defendant; after stating the employment of M. by his firm, the letter contained the following: "I will undertake that the agreement made by him to pay a certain amount to you each year shall be carried out until the indebtedness to your firm is liquidated." Plaintiffs accepted the proposition and surrendered the bonds. In an action upon the guaranty contained in defendant's letter, *held*, that the letters were to be taken and construed together; that upon their face it appeared that defendant's promise was made to procure the release of the bonds, which it accomplished, and this was a valid consideration; that, therefore, the requirements of the Statute of Frauds were met, the promise was valid and defendant was liable.

Also, *held*, that the guaranty was not limited to the time M. remained in the employ of R. & Co.

E. N. Bank v. Kaufmann (93 N. Y. 273), distinguished.

It seems a written guaranty given by a third person to a creditor that the debtor will pay a pre-existing debt, must, notwithstanding the amendment of the Statute of Frauds by the act of 1863 (Chap. 464, Laws of 1863), expressly or by fair implication disclose that the promise rests on a legal consideration.

Speyers v. Lambert (1 Sweeney, 335; 6 Abb. Pr. [N. S.] 309; 37 How. Pr. 815), stated to have been overruled.

Reported below, 44 Hun, 446.

(Argued January 29, 1890; decided February 25, 1890.)

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Statement of case.

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made May 13, 1887, which affirmed a judgment in favor of plaintiffs, entered upon a verdict directed by the court.

This was an action upon an alleged guaranty. The facts are sufficiently stated in the opinion.

Frederick R. Coudert for appellant. The defendant's promise was void under the Statute of Frauds, because the written memorandum subscribed by him does not state the terms of the agreement, nor indicate, without resort to oral testimony, any other memorandum that does. (*Wood v. Midgley*, 5 DeG. M. & G. 41; *Doe v. Pedgriph*, 4 C. & P. 312; *Wright v. Weeks*, 25 N. Y. 153; *Neuberry v. Wall*, 65 id. 488; *Stone v. Browning*, 68 id. 604; *Drake v. Seaman*, 97 id. 233, 234, 237; *Long v. Millar*, 4 C. P. Div. 450; *Ridgway v. Wharton*, 3 De G. M. & G. 693; *Brown v. Whipple*, 58 N. H. 229; *Smith v. Jones*, 42 Am. Rep. 72; *Ridgway v. Ingram*, 50 Ind. 145; *Williams v. Morris*, 95 U. S. 456; *Grafton v. Cumings*, 95 id. 100.) The defendant's promise was void because the memorandum expresses no consideration, nor does it state anything from which the consideration can be clearly determined. (*Church v. Brown*, 21 N. Y. 331; *Drake v. Seaman*, 97 id. 235; *Castle v. Beardsley*, 10 Hun, 343; *Clark v. Hampton*, 1 id. 612; *Hall v. Farmer*, 2 id. 553; *Smith v. Ives*, 15 Wend. 182; *Sage v. Wilcox*, 6 Conn. 81; *Breed v. Hillhouse*, 7 id. 523; *McCorney v. Stanley*, 8 Cush. 85; *Walker v. Sherman*, 11 Met. 170; *Crofts v. Beale*, 11 C. B. 172.) The plaintiffs' fraudulent concealment of *Mur's* dishonest acts and of the stolen character of the securities concerned annulled defendant's promise and destroyed the consideration. (*F. Nat. Bank v. Van Slyke*, 49 Hun, 7; *Story Eq. Jur.*, § 215; *Kerr on Fraud & Mistake*, 122, 123; *Morse on Banking*, 226; *Bigelow on Fraud*, 44-45; *DeColyar on Guarantees*, 370; *Graves v. L. N. Bank*, 19 Am. Rep. 50; *F. Bank v. Cooper*, 36 Me. 179; *Railton v. Matthews*, 10 C. & F. 934; *Sooy v. Slate*, 39 N. J. L. 135; *Dinsmore v.*

Statement of case.

Tidball, 34 Ohio, 411; *Barter v. Duren*, 39 Me. 434; *D. R. Co. v. Jarvis*, 20 N. Y. 226; *Herrick v. Whitney*, 15 Johns. 240; *Cross v. Huntley*, 13 Wend. 385; *Lewis v. Cosgrove*, 2 Taunt. 2.) The promise of defendant did not constitute an original debt by him, and cannot thus be taken out of the statute. (*Prime v. Koehler*, 77 N. Y. 91; *Brown v. Weber*, 38 id. 187; *Clapp v. Webb*, 9 N. W. Rep. 796; *White v. Rintoul*, 108 N. Y. 222; *Nelson v. Boynton*, 3 Metc. 396; *Dows v. Swett*, 134 Mass. 149; *Krutz v. Stewart*, 54 Ind. 170; *Mitchell v. Griffin*, 58 id. 559; *Millard v. Borshard*, 32 N. W. Rep. 538; *Sext v. Geise*, 6 S. E. Rep. 174; *Palmer v. Blain*, 55 Ind. 11; *Haverley v. Mercer*, 78 Pa. 257; *Ruppe v. Peterson*, 35 N. W. Rep. 82; *Hooker v. Russell*, 97 Wis. 257; *Gill v. Herrick*, 111 Mass. 501; *Stewart v. Campbell*, 4 Am. Rep. 296; *Richardson v. Robbins*, 124 Mass. 105; *Read v. Ladd*, 1 Edm. [S. C.] 100; *Knox v. Nutt*, 1 Daly, 213; *Jones v. Walker*, 13 B. Mon. 357; *Waggoner v. Gray*, 2 H. & M. 603; *Ware v. Stephenson*, 19 Leigh, 155.)

Henry S. Bennett for respondent. The letters constitute a valid contract in writing under the Statute of Frauds. (*E. N. Bank v. Kaufman*, 93 N. Y. 276; *Drake v. Seaman*, 97 id. 230.) It is clear that the guarantee of Forbes was substituted with his knowledge for the bonds as guaranty for Mur's debt. (*E. C. S. Bank v. Coit*, 104 N. Y. 536.) The case at bar has, however, an element which distinguishes it from the foregoing cases, and makes the promise of defendant original and not collateral. Such promise need not be in writing. It is valid even if oral. The testimony shows that the consideration passed concurrently with and in consequence of the promise. (*E. C. S. Bank v. Coit*, 104 N. Y. 536; *White v. Rantoul*, 108 id. 223; *Ackley v. Parmenter*, 98 id. 425; *Milk v. Rich*, 80 id. 269; *Prime v. Koehler*, 77 id. 91; *Mallory v. Gillett*, 21 id. 413; *Nugent v. Wolfe*, 5 East. Rep. 374.) No proposition of law founded on the fact of the bonds not having been owned by Mur can aid appellants. (*Knickerbocker v. Gould*, 115 N. Y. 538; *Salisbury v. Howe*,

Opinion of the Court, per FOLLETT, Ch. J.

87 id 132; *Merrill v. U. C. Co.*, 114 id. 218; *Newhall v. Bartlett*, Id. 399.)

FOLLETT, Ch. J. August 31, 1882, J. M. Mur was indebted in the sum of \$9,941.88 to the plaintiffs, who held as collateral, eight first mortgage bonds for \$1,000 each, with several coupons attached, issued by the Boston, Hartford & Erie Railroad Company, and four hundred of the shares of the stock of that corporation. The shares were of little, or no value; but the value of the bonds and coupons was about equal to the debt. At this time the defendant was one of the partners of Russell & Co., and on the date mentioned, he inclosed the following letters in an envelope and sent them to the plaintiffs:

“NEW YORK, August 31, 1882.

“Mess. BARNEY, RAYMOND & Co., 84 Broadway,

“DEAR SIRs:—Mr. J. M. Mur being under engagement to Mess. Russell & Co., as their head bookkeeper, will have \$4,000 (Mexican) per annum as salary, and I will undertake that the agreement made by him to pay a certain amount to you each year, shall be carried out, until the indebtedness to your firm is liquidated.

“Yours truly,

“JOHN M. FORBES, JR.”

“NEW YORK, August 31, 1882.

Messrs. BARNEY, RAYMOND & Co., New York,

“DEAR SIRs:—As you are aware I have accepted a position in China in the house of Messrs. Russell & Co., at a salary of \$4,000 per annum, and in order to liquidate my indebtedness to you of \$9,941.88, as per account rendered yesterday, I now pledge to you to remit you from China the sum of \$3,000 (three thousand dollars per annum), in quarterly payments, until the said account is closed. There shall be no failure on my part, and I trust with this assurance and the letter inclosed that this arrangement will be satisfactory, and that you will release the bonds in question.

“I am, dear sir, very respectfully yours,

“J. M. MUR.”

Opinion of the Court, per FOLLETT, Ch. J.

After receiving these letters the plaintiffs surrendered the bonds, but when, or to whom does not appear. On different dates, between August 31, 1882, and October 20, 1884, Mur paid on his debt \$3,429.25, and afterwards this action was brought to recover the remainder from the defendant, on the ground that he bound himself, by the letters, to pay Mur's debt.

The defense interposed is that defendant's promise contained in his letter of August 31, 1882, is void by the second section of the second title of the Statute of Frauds, because the consideration which moved him to undertake that Mur should perform the promise which he made in his letter of the same date, does not appear upon the face of the letter signed by the defendant, or, upon the face of both of the letters, read together.

The defendant insists that his letter does not refer to Mur's, and that the two are not, by their language, so obviously connected that they may be read together for the purpose of ascertaining the terms and consideration of the defendant's promise. His letter states that Mur had been employed by Russell & Co. on a salary of \$4,000 per annum. Mur's letter states the same fact. The defendant states in his letter: "I will undertake that the agreement made by him (Mur) to pay a certain amount to you (plaintiffs) each year, shall be carried out until the indebtedness to your firm is liquidated." Mur's letter agrees to pay plaintiffs a certain amount, \$3,000 each year, to liquidate his indebtedness, and refers to "the letter inclosed." It was undisputed that both letters were inclosed in an envelope and sent by the defendant to the plaintiffs. It was competent to show this fact by oral evidence, for the same reason that it is competent to show by like evidence how and when letters forming a part of an entire correspondence were received. The delivery and circumstances attending the delivery of writings may be shown by oral evidence. Both letters must be read together, (*Coe v. Tough* 116 N. Y. 273), and if both satisfy the requirements of the Statute of Frauds, the defendant must be held liable.

Opinion of the Court, per FOLLETT, Ch. J.

A written guaranty given by a third party to a creditor, that his debtor will thereafter pay to him a pre-existing debt, must, notwithstanding the amendment of the Statute of Frauds by chapter 464 of the Laws of 1863, expressly or by fair implication, disclose that the promise rests on a legal consideration. (*Castle v. Beardsley*, 10 Hun, 343; *Drake v. Seaman*, 97 N. Y. 230; Reed on Stat. Frauds, §§ 423, 426.) Since that amendment the courts have held, with great uniformity, that all of the essential parts of contracts within the amended section must be in writing. (*Newbery v. Wall*, 65 N. Y. 484, 488; *Stone v. Browning*, 68 id. 598, 604; *Drake v. Seaman*, *supra*.) The existence, or the acknowledgement of the existence, of a legal consideration for the support of such promise, is not only essential, but is absolutely indispensable. The history of this question is fully given in *Church v. Brown* (21 N. Y. 331) and in *Drake v. Seaman* (*supra*), and it is quite unnecessary to again go over the cases or give reasons for the existence of the rule. *Speyers v. Lambert* (1 Sweeney, 335; 6 Abb. Pr. [N. S.] 309, and 37 How. Pr. 315), must be regarded as overruled. In *Evansville National Bank v. Kaufmann* (93 N. Y. 273), the defendants were held not to be liable upon their written guaranty, because there was, in fact, no consideration for it, nor was any expressed in the writing. It was said in *Drake v. Seaman* (97 N. Y. 234): "What was said in *Evansville National Bank v. Kaufmann* (93 N. Y. 273), was not at all intended to decide the question upon which the courts have thus differed. The guaranty there was special and without consideration in fact, and the question now under discussion was not before the courts."

To ascertain the meaning of an ambiguous written contract, the circumstances under which it was executed and the matters to which it relates, may be established by oral evidence and considered by the court. Mur was indebted to the plaintiffs in the sum of \$9,941.88, and had left with them eight bonds as collateral. The amount due is stated in Mur's letter, which concludes: "I trust, with this assurance (Mur's letter), and the letter (defendant's letter) inclosed, that this arrangement will

Statement of case.

be satisfactory, and that you will release the bonds in question." The proposition contained in the letters was accepted by the plaintiffs, and the bonds in question were released. We think it appears on the face of the letters that defendants' promise was made to procure the release of the bonds which it secured, and was a valid consideration for his warranty.

There is no evidence that the defendant was induced to promise by the representations of the plaintiffs, or that they concealed any fact from him. The evidence does not show that the plaintiffs had not a good title to the eight negotiable bonds.

The obligation created by the words: "I now pledge to you to remit you from China the sum of \$3,000 (three thousand dollars per annum), in quarterly payments, until the said account is closed," the performance of which the defendant guaranteed, is not limited by the other parts of the letters, to a contract to pay only during the time that Mur remained in the employ of Russell & Co.

The judgment should be affirmed, with costs.

All concur, except HAIGHT, J., not sitting.

Judgment affirmed.

118	586
134	74
118	586
169	*419

WARREN CHEMICAL AND MANUFACTURING COMPANY, Appellant, v. GILES H. HOLBROOK, Respondent.

In an action to recover for a quantity of roofing materials, the answer set up as a counter-claim that defendant entered into an oral contract with plaintiff to solicit contracts for putting on plaintiff's patent roofing within certain territory, defendant to have the exclusive right to do the work, he paying plaintiff an agreed price for the material; that aided and assisted by defendant, who contributed both time and money, plaintiff procured a contract to put the roofing on certain buildings, it being expressly agreed that defendant was to do the work; that he proceeded to make the necessary arrangements to fulfill the contract, including the purchase of certain materials plaintiff did not furnish; that he was only permitted to do a portion of the work, and plaintiff did the balance and retained the money paid therefor. Evidence was

Statement of case.

given on the part of defendant sustaining the allegations of the answer, with the proviso that the agreement was to last during the pleasure of plaintiff. *Held*, that the counter-claim was properly allowed; that the contract was not within the Statute of Frauds; that the establishment of the counter-claim did not depend upon whether, under the original agreement, defendant was exclusively entitled to do the work, as his agency was adopted in, and extended to, the transaction in question; that the right reserved by plaintiff to terminate the agreement at its pleasure was subject to the requirements of good faith, and could not be exercised after the contract for the roofing had been obtained, as to that contract, so as to deprive the agent of his profits.

The contract for the work in question was at so much a square foot. Defendant was permitted to prove what it would have cost him to do the work. *Held*, no error; that the damages recoverable by defendant were the loss of profits so far as provable.

Where the compensation of an agent is dependent upon the success of his effort in procuring a contract for his principal, and his subsequent performance of the work, the principal will not be permitted when the contract is obtained and compensation assured, to terminate the agency for the sole purpose of securing to himself the agent's profits.

A contract for the sale of articles thereafter to be manufactured and delivered does not come within the Statute of Frauds.

So, also, that statute does not include an agreement which is not likely or is not expected to be performed within a year, if when fairly and reasonably interpreted it admits of a valid execution within that time.

Where part of an answer given to a proper question is not responsive, an objection and exception thereto does not present the question for review as to whether the testimony is competent; it can only be presented by motion to strike out.

(Argued January 31, 1890; decided February 25, 1890.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon order made May 13, 1887, which affirmed a judgment in favor of defendant entered upon a verdict.

The nature of the action and the facts so far as material are stated in the opinion.

Wm. W. Niles for appellant. The defendant had not paid for the goods he had already received, and, therefore, he first broke the agreement, even if there was one, and plaintiff was justified in refusing to deliver more. (*Mallory v. Gillett*, 21 N. Y. 412; 3 R. S. [7th ed.] 2327; *Stone v. Browning*, 51 N. Y. 211; 68 id. 598.) Fraud or bad faith must be clearly

Statement of case.

proved, and cannot be presumed from facts just as consistent with innocence as with guilt. (*Shultz v. Hoagland*, 85 N. Y. 464.) On the question of damages we submit that even if appellant had performed this contract without any sufficient reason, the speculative profits or estimated profits of the job are not the true measure of damages where no demand for permission to do the work, and no tender or offer to do it, is proved, and where it does not appear that the party was not occupied on other equally profitable contracts during the same period. (*D., L. & W. R. R. Co. v. Bowns*, 58 N. Y. 580; *Higgins v. D., L. & W. R. R. Co.*, 60 id. 557; *Born v. Schrenkeisen*, 110 id. 55; 2 *Parsons on Contracts*, 675, 681.)

William Talcott for respondent. The contract did not come within the Statute of Frauds. (*Crookshank v. Burrell*, 18 Johns. 58; *Downs v. Ross*, 23 Wend. 270; *Ferren v. O'Hara*, 62 Barb. 517; *Smith v. N. Y. C. R. R. Co.*, 4 Keyes, 180; *Parsons v. Loucks*, 48 N. Y. 17; *Kent v. Kent*, 62 id. 560; *Van Woert v. A. & S. R. R. Co.*, 67 id. 538; *LeGrand v. M. M. Assn.*, 80 id. 638; *Doyle v. Dixon*, 97 Mass. 208; *Heath v. Heath*, 31 Wis. 223; *Knowlton v. Bluett*, L. R. [9 Exch.] 1; *Gault v. Brown*, 48 N. H. 183; *Green v. Harris*, 9 R. I. 401; *Roberts v. R. Co.*, 7 Metc. 46; *Hodges v. R. M. Co.*, 9 R. I. 482; *Smart v. Smart*, 97 id. 559; *McKnight v. Dunlop*, 5 id. 537; *Thompson v. Mink*, 2 Keyes, 86.) The evidence touching the transactions between plaintiff and defendant during all the dealings between them, from the commencement of their business relations up to the time of the rupture between them, was properly admitted in order that the jury might judge as to the relationship existing between the parties at the time the dispute in this case arose. (*Patten v. Pancoast*, 109 N. Y. 625.) Whether or not the defendant was himself directly or definitively appointed the agent for northern New Jersey for the plaintiff, he was distinctly recognized by the plaintiff through its officers as such agent. (*Olcott v. T. R. R. Co.*, 27 N. Y. 546; *Woodbridge v. Proprietors*, 6 Vt. 204; *Zabris-*

Opinion of the Court, per PARKER, J.

kie v. C., C. & C. R. R. Co., 23 How. [U. S.] 381, 400; *P., W. & B. R. R. Co. v. Cowell*, 28 Penn. St. 329; *Bargate v. Shortridge*, 5 H. L. Cas. 297, 318; *Totterdell v. F. B. & T. Co.*, L. R. [1 C. P.] 674; *Evans v. Smallcome*, L. R. [3 Eng. & Ir. App.] 249.) Although the defendant was agent of the plaintiff at the plaintiff's will, and the contract between them was determinable at any time at the option of the plaintiff, yet such determination of the contract could not be made as to any work procured or begun prior to notice of such determination unless for cause arising from the work immediately in hand. (*New England Iron Co. v. Gilbert E. R. R. Co.*, 91 N. Y. 153; *Wakeman v. Wheeler & Wilson Mfg. Co.*, 101 N. Y. 205; *Parmelee v. Adolph*, 28 Ohio St. 10; *Carney v. Newberry*, 24 Ill. 203; *Lawrence v. Dale*, 3 Johns. Ch. 23, 37; *McNeven v. Livingston*, 17 Johns. 437; *Masson v. Bovet*, 1 Denio, 69; *Bruce v. Davenport*, 3 Keyes, 472.) The defendant was entitled to do the work on the West Shore roofs and to make a profit thereon. (*Wakeman v. W. & W. M. Co.*, 101 N. Y. 205; *Sibbald v. B. I. Co.*, 83 id. 378, 384.) The proper measure of damages was the amount of profit which the defendant would have made in putting on the roofs at the price which he named to the West Shore Railroad Company, and the jury did right in awarding that profit as the defendant's damages on the counter-claim. (*Wakeman v. W. & W. M. Co.*, 101 N. Y. 205; *Boyd v. Meighan*, 19 Vroom, 404; *Wolcott v. Mount*, 7 id. 262; *Hadley v. Baxendale*, 9 Exch. 341; *Bridge v. Wain*, 1 Starkie, 504; *Masterton v. Mayor, etc.*, 7 Hill, 61; *Fox v. Harding*, 7 Cush. 516; *Dennis v. Maxfield*, 10 Allen, 138; *Simpson v. L. & N. W. R. Co.*, L. R. [1 Q. B. Div.] 274; *Fleck v. Weather-ton*, 20 Wis. 392; *White v. Miller*, 71 N. Y. 118, 132; *Mitchell v. Read*, 84 id. 556; *Danolds v. State*, 89 id. 36; 1 Sutherland on Damages, 113; *Dart v. Laimbeer*, 107 N. Y. 664, 669.)

PARKER, J. This action was brought to recover for a quantity of roofing material. The answer admitted the sale,

Opinion of the Court, per PARKER, J.

delivery and balance unpaid to be as set forth in the complaint, and set up by way of counter-claim, in substance, that defendant was the agent of the plaintiff for the district of northern New Jersey for "Warren's Anchor Brand National Asphalt Roofing." That by the terms of the agency he solicited contracts for putting on the plaintiff's patent roofing. The contracts to be made with the plaintiff, but the defendant to do the work and pay the plaintiff an agreed price for the material. That within his territory, the plaintiff, aided and assisted by the defendant, procured a contract to put the roofing on some buildings about to be erected, or in process of erection by the West Shore and Buffalo Railway Company. That it was expressly stated to him by the officers and agents of the plaintiff that he was to do the work. He then proceeded to make the necessary arrangements in order to fulfill the contract, including the purchase of gravel and other materials which the plaintiff did not furnish. That he was only permitted to put on the roof of the round-house, the plaintiff refusing to furnish the materials or suffer him to do the other work. That instead, the plaintiff did the work and retained the moneys paid therefor. That thereby he sustained damages to the amount of \$6,756, and demanded judgment therefor, less the amount of plaintiff's claim. He also demanded a further sum, by way of counter-claim, for work done upon another building, but as the verdict of the jury was in favor of the plaintiff, as to it, no further reference thereto is required. What may be said hereafter will refer solely to the first counter-claim.

At the close of the testimony the plaintiff moved the court for a dismissal of the counter-claim and for judgment. Several grounds were assigned, but they may properly be grouped into three propositions: First, there is not sufficient evidence of a contract of agency to authorize a recovery; second, if there was a contract, then the plaintiff having reserved the right to terminate it, the exercise of such right relieved it from all liability, and third, in any event the alleged contract was void under the Statute of Frauds.

The evidence on the part of the plaintiff tended to show,

Opinion of the Court, per PARKER, J.

that, prior to February, 1872, the Messrs. Morton were acting as agents for the plaintiff in a territory known as northern New Jersey. That, at about that time, the defendant bought out one of the Mortons, and the new firm was recognized by the plaintiff as its agents. Subsequently the firm was dissolved and the defendant alone continued the business. The plaintiff was notified of the change and accepted the defendant as its agent. That it was agreed that during the pleasure of the plaintiff, the defendant should have the exclusive right to apply the roofing material within the territory of northern New Jersey.

Under this arrangement the defendant alone, and also in conjunction with the officers and employees of the plaintiff, solicited contracts for the putting on of the roofing. When a piece of work was obtained, the contract was made by the plaintiff. It shipped the patent roofing to the defendant who did the work and furnished such other materials as were required to perform the contract. The defendant paying the plaintiff an agreed price for the patent roofing and retaining the balance of the contract price for services rendered in attempting to secure contracts and putting on the roofing.

In the fall of 1881, some of the agents or servants of the plaintiff called defendant's attention to the amount of roofing in contemplation by the New York, West Shore and Buffalo Railway Company, and requested him to join in an attempt to to secure the job. This he did, and to that end contributed both time and money. The president of the plaintiff requested that the price be named by the defendant and asserted that if the contract should be obtained it would be in the defendant's territory and would be his job. It was obtained, and subsequently the defendant was instructed to prepare to perform the work. He entered upon its performance, but was only permitted to roof the round-house. Whether, by the terms of the agency, the defendant acquired the exclusive right to use the plaintiff's roofing materials within the territory in which the West Shore buildings are situate was sharply litigated upon the trial and has been pressed upon our attention here.

Opinion of the Court, per PARKER, J.

Respecting that issue we agree with the learned trial court that the establishment of defendant's counter-claim does not depend upon whether under the original agreement of agency the defendant was exclusively entitled to put on the roofing in this territory. For the evidence at least permitted a finding that not only had he been an agent of the plaintiff for years, but that such agency was recognized and adopted in and extended to this particular transaction.

As to the existence of the contract of agency, therefore, a question was presented for the jury.

It was also urged, in support of the motion for judgment, that by the terms of the agency the plaintiff was at liberty to terminate it at any time. That, therefore, the plaintiff did but exercise a right reserved, of which the defendant cannot be heard to complain. We cannot assent to that proposition in the breadth contended for it. The right to terminate the agency had only one limitation it is true, but it had one. The time of its exercise was subject to the ordinary requirements of good faith. When the compensation of an agent is dependent upon the success of his efforts in procuring a contract for his principal, and his subsequent performance of the work, the principal will not be permitted to stimulate his efforts with the promise of reward, and then when the contract is obtained and the compensation assured after construction, terminate the agency for the sole purpose of securing to himself the agent's profits. At any time before there was a reasonable assurance that the contract would be obtained, the plaintiff might have terminated the agency.

But after it was obtained, and his right to such profits as might accrue became assured, it could not be put at an end in bad faith and as a mere device to deprive the agent of the fruit of his labors.

The defendant's evidence tended to show that the plaintiff's refusal to permit him to complete the work after he had, by his direction, purchased materials and entered upon its performance was done in bad faith, and for the sole purpose of depriving him of the large profits likely to accrue. On the

Opinion of the Court, per PARKER, J.

other hand, the trend of plaintiff's evidence was in the direction of good faith on its part in terminating the agency. Thus was presented a question of fact for the consideration of the jury, and the trial court rightly so held. Assuming that the contract was one for the sale and delivery of patent roofing materials, to be thereafter manufactured and delivered, the most favorable view possible for the plaintiff, it is not within the Statute of Frauds. True there was no note or memorandum of the contract. But, in this state, we regard the established rule to be that a contract for the sale of articles thereafter to be manufactured and delivered does not come within the condemnation of that provision. (*Parsons v. Loucks*, 48 N. Y. 17.)

While it is true, as insisted by the appellant, that it was not provided by the terms of the contract that it should be performed within one year from its making, neither was it provided that it should not be performed within such period. Nothing whatever was said as to time. Now the statute does not include an agreement which is simply not likely to be performed, nor yet one which is simply not expected to be performed within the space of a year. Neither does it include an agreement which, fairly and reasonably interpreted, admits of a valid execution within that time, although it may not be probable that it will be. (*Kent v. Kent*, 62 N. Y. 560.)

The statute, as interpreted by the courts, therefore, does not include this agreement, for there is nothing in its terms inconsistent with complete performance within a year.

It follows that the motion for judgment was properly denied.

The first exception to which our attention is called does not present a question for review. The objectionable evidence constituted the unresponsive portion of an answer to a proper question answered without objection. The plaintiff contented himself with an objection and exception, after answer given, instead of a motion to strike out.

The rejection of the letters marked "G" and "H" for identification appears to have been based, in part, upon the

Statement of case.

objection that they had no reference to the contract in dispute. As we are prevented from examining them by reason of their exclusion from the printed record, it must be assumed that the trial court rightly determined that they did not relate to the pending controversy.

The evidence offered for the purpose of showing the amount of damages sustained was properly received. It was proved that by the contract with the railroad company plaintiff was to receive six and one-half cents per square foot. Defendant was permitted to testify that it would have cost him four and one-half cents per square foot. The element of damage recoverable in this case consisted of gains prevented. The proper measure, therefore, was the loss of profits so far as provable. (*Wakeman v. Wheeler & Wilson Mfg. Co.*, 101 N. Y. 205.)

An examination of each of the many exceptions taken fails to disclose any error justifying a reversal.

Judgment should be affirmed.

All concur, except HAIGHT, J., not sitting.

Judgment affirmed.

118 594
131 536

WILLIAM CAMPBELL, Respondent, v. ABNER M. WRIGHT, et al.
Appellants.

Where brokers who had sold wheat short for a customer on a margin bought in without authority on his account, and he, on being advised thereof, repudiated the purchase and subsequently directed the brokers to purchase for him at a price specified, which they refused to do, and it appeared that wheat could have been purchased in the market for several days after the order at the price named, *held*, that plaintiff's damages were the amount defendants would have been indebted to him, had they made the purchase as directed; that for the purpose of the remedy plaintiff's position was not affected by the unauthorized purchase; that the breach of contract was in the refusal of defendants to purchase when and as instructed, and this fixed the measure of damages. The distinction between such case and one of a purchase by a broker for his customer on a margin pointed out.

(Argued January, 14, 1890; decided February 25, 1890.)

Statement of case.

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department entered upon an order made February 23, 1887, which affirmed a judgment in favor of plaintiff entered upon a verdict.

The nature of the action and the facts are sufficiently stated in the opinion.

D. M. Porter for appellants. The margin having been demanded a reasonable time before the wheat was bought in, the defendants were entitled to a verdict as a matter of law, and the submission of the question to the jury by the court was error. (*Wheelock v. Tanner*, 39 N. Y. 481-486; *Sterling v. Jaudon*, 48 Barb. 459; *Milliken v. Dehon*, 27 N. Y. 364, 366, 372.) The stop order limit having been reached, and the purchase of wheat having been made pursuant to the stop order, it was legal. (*Porter v. Wormser*, 94 N. Y. 431; *Wheelock v. Tanner*, 39 id. 481, 486; *Pollock v. Pollock*, 71 id. 137, 140.) The court erred in charging that plaintiff was entitled to recover the \$2,000 in this action, and that it was immaterial whether the action was for a conversion or for a breach of contract. (*Gruman v. Smith*, 85 N. Y. 25; *Baker v. Drake*, 53 id. 211; 66 id. 518, 524; *Colt v. Owens*, 91 id. 368.) There being no time mentioned when the margin should be paid, it was payable on a reasonable demand, and plaintiff having failed to pay it was a breach of the contract. (*Oakley v. Morton*, 11 N. Y. 25; *Paige v. Ott*, 5 Den. 406; *Story v. Brennan*, 15 N. Y. 524; *Booth v. B. & A. R. R. Co.*, 67 id. 593; *Hutchins v. Hutchins*, 98 id. 56; *Leeds v. M. G. L. Co.*, 90 id. 26; *Baldwin v. Burrows*, 47 id. 199; *Sayre v. Townsend*, 15 Wend. 647; *Rogers v. Murray*, 3 Bosw. 357; *Weber v. Kingsland*, 8 id. 415, 416; *Green v. H. R. R. R. Co.*, 32 Barb. 25; *Nixon v. Palmer*, 10 id. 175; *Flanders v. Merritt*, 3 id. 201; *Fry v. Bennett*, 28 N. Y. 324; *Anderson v. Rounce*, 54 id. 334; *Requa v. Holmes*, 16 id. 193; *C. Bank v. U. Bank*, 11 id. 203, 210.)

W. R. Darling for respondent. The question admitted as to the price of wheat on April 13, 14 and 15, 1885, was proper.

Statement of case.

It did not call for hearsay evidence, and there was no motion to strike out the answer, or any part of it, after it was made or after the cross-examination, or for any instruction to disregard it. (*Turner v. City of Newburgh*, 109 N. Y. 301; *Denise v. Denise*, 110 id. 562; *Platner v. Platner*, 78 id. 91; *Lerche v. Brusher*, 104 id. 157; *Byrnes v. Byrnes*, 102 id. 5, 9; *White v. O. D. S. S. Co.*, Id. 660, 664; *Williams v. Sargeant*, 46 id. 481.) The evidence offered and received that the "stop order" price of ninety-three and three-eighths was not reached at any regular session of the board, or at any sale in the usual and ordinary way, and did not justify a purchase in, to cover, under the "stop order" was proper. (112 N. Y. 226; *Schwinger v. Raymond*, 105 id. 648; *McCarney v. People*, 83 id. 409, 415; *T. A. R. R. Co. v. Ebling*, 100 id. 98, 100; *S. O. Co. v. A. Ins. Co.*, 79 id. 506, 510; *Langley v. Wadsworth*, 99 id. 61.) The letter offered and received was properly admitted. (*Scott v. M., etc., R. R. Co.*, 86 N. Y. 200, 208, 209; *Roe v. Day*, 7 C. & P. 705; 97 N. Y. 10; *Strong v. Strong*, 1 Abb. Pr. [N. S.] 233, 237; *Nunn v. Reitzenthaler*, 18 Wkly. Dig. 114, 115; *Newcomb v. Cramer*, 9 Barb. 402; *N. E. M. Ins. Co. v. De Wolf*, 8 Pick. 56; *Holler v. Weiner*, 10 Penn. St. 242; *Waldle v. N. Y. C. & H. R. R. Co.*, 95 N. Y. 274, 275.) To the ruling as to the admission of the plaintiff's "demand" letter to defendants, there was no exception. It is, therefore, useless on appeal. (*Schwinger v. Raymond*, 105 N. Y. 648; *T. A. R. R. Co. v. Ebling*, 100 id. 98, 100; *Loof v. Lawton*, 97 id. 478, 484; *Stokes v. Johnson*, 57 id. 673, 675; *Learned v. Tillotson*, 97 id. 1, 10.) Under the facts of this case the defendants were bailees or depositaries of the "margin" moneys of plaintiff in their hands for possible indemnity in this transaction, and for return of which this suit was brought. They came rightfully into its possession, and on their refusal to perform their contract, demand was necessary to plaintiff's suit for its return, both to fix a date for the running of the statute of limitations, and of interest, and to put them in the wrong. (*Sharkey v. Mansfield*, 90 N. Y. 227, 229; *Southwick v. F. Nat. Bank*.

Statement of case.

84 id. 420, 430; *Paine v. Gardiner*, 29 id. 146; *Goodwin v. Wertheimer*, 99 id. 149, 153; *Dart v. Laimbeer*, 107 id. 664, 669; *Lerche v. Brasher*, 104 id. 157, 161; *Tenney v. Berger*, 93 id. 524, 531; *Adams v. Boucerman*, 109 id. 23, 31.) That part of the answer objected to, that the record made up was the "only official record of transactions" and quotations in the board, was proper upon the question as to whether there was a record of them or not. (*Champney v. Blanchard*, 39 N. Y. 111, 115; *Wilson v. N. Y. C. R. R. Co.*, 2 Trans. App. 298; *Turner v. City of Newburgh*, 109 N. Y. 301, 308.) The record being of the Chicago Board of Trade and being taken there, was presumptively out of the jurisdiction of the trial court, and not in control of plaintiff; proof of its contents was therefore proper. (*Burton v. Driggs*, 20 Wall. 125, 134; *Bronson v. Tuthill*, 1 Abb. Ct. App. Dec. 206.) The use of such records and evidence of the credit given to them and of their circulation among the trade as evidence of quotations is supported by *Slocovich v. O. Ins. Co.* (108 N. Y. 56, 62, 63); *Lush v. Druse* (4 Wend. 313, 317); *Ellsworth v. Aetna Ins. Co.* (26 Wkly Dig. 53); *Mayor, etc., v. S. A. R. R. Co.* (102 N. Y. 573, 580); *Whelan v. Lynch* (60 id. 469); *Cliquot's Champagne* (3 Wall. 114, 141); *Fennerstein's Champagne* (3 Wall. 145); *Garwood v. N. Y. C. & H. R. R. Co.* (27 Wkly. Dig. 25; 45 Hun, 128, 130); 1 Whart. on Ev. (2d ed.) § 674. All the matters as to the board of trade records, quotations, acceptance, circulation and reliance were fully admitted in evidence and proved without objection. Even if erroneously admitted before, such subsequent admission without objection, makes any prior admission of them no ground of error on appeal. (*White v. O. D. S. S. Co.*, 102 N. Y. 660, 664; *Byrnes v. Byrnes*, Id. 4; *People v. Driscoll*, 107 id. 414, 425.) The case does not show that there was any such special contract between the parties as appears in many of the reported cases, that the broker might close the plaintiff out without call for margin and reasonable notice to furnish it—reasonable notice is implied from this contract unless it is specially waived. (*Markham v. Jaudon*,

Opinion of the Court, per BRADLEY, J.

41 N. Y. 235, 239; *Hess v. Rau*, 95 id. 359, 362.) There was no error in the charge; it is to be construed as a whole and not by detached phrases merely. (*Cumming v. B. C. R. R. Co.*, 104 N. Y. 669, 673; *Losee v. Buchanan*, 51 id. 476, 493; *Caldwell v. N. J. S. Co.*, 47 id. 282; *People v. Dimmick*, 107 id. 14.) The rule in cases of conversion does not apply here; there was nothing to convert. The complaint settled the character of the suit as in contract. (*Welsh v. Darragh*, 52 N. Y. 590; *Carpenter v. Stilwell*, 11 id. 61; *Hamilton v. Eno*, 81 id. 116, 127; *Palmer v. Holland*, 51 id. 416; *Hodges v. Cooper*, 43 id. 216.)

BRADLEY, J. The defendants, brokers at Chicago, on the 9th day of April, 1885, pursuant to arrangement with plaintiff, who lived in the city of New York, sold short for the latter 50,000 bushels of wheat at the price of eighty-seven and five-eighths cents per bushel, deliverable in May following. The defendants were represented in the city of New York by one Brown, and one Dawson acted for the plaintiff there. To carry out the arrangement the plaintiff deposited with Brown \$1,500 on that day, and on the thirteenth April a call was made upon him for the further sum of \$1,500, which was furnished on that day and the morning of the fourteenth.

Late in the evening of the thirteenth Brown sent a telegram to the plaintiff asking for an additional margin of \$1,500, and saying that May wheat closed on curb at ninety-one and a quarter. This last call was not met by the plaintiff, and on the next day Brown sent a messenger to him with a note requesting him to send that amount by the bearer, and adding that wheat was then ninety-two and a quarter. This was sent at 1.30 P. M. a distance of four miles to plaintiff, who, in reply, sent by the bearer of it to Brown a stop order, so-called, directing the defendants to cover his short by purchase on his account when the price reached ninety-three and three-eighths, which the \$3,000 margin already supplied would permit.

This was received by Brown at 3.05 P. M. of the fourteenth, and he replied to this stop order by dispatch sent from tele-

Opinion of the Court, per BRADLEY, J.

graph office at 3.39 P. M. to the plaintiff, to the effect that the defendants would do the best they could, but could not carry over night if market closed near the stop order limit.

The time before mentioned was that in New York, the Chicago time was one hour less. The daily sessions of the board of trade in Chicago were from 9.30 A. M. until 1 P. M., and from 2 to 2.30 P. M. The defendants, at 2.25 P. M. Chicago time, bought in fifty thousand bushels of wheat at ninety-one and three-eighths on the plaintiff's account. The latter, when informed of it, and on sixteenth April, gave the defendants notice that he repudiated it, and instructed them to purchase on his account fifty thousand bushels May wheat at eighty-seven and three-eighths. The defendants, treating the transaction of the sale of the ninth April closed by their purchase, declined to do so. And the plaintiff, on the next day, demanded of them the payment to him of \$3,000 damages. They paid him \$1,000, the balance as represented by their account of the transaction of the sale and purchase. This action was brought to recover the residue of the asserted claim. And the plaintiff recovered \$2,000 and interest. The main question litigated on the trial was, whether the purchase made by the defendant on plaintiff's account was in violation of their duty to him, which they assumed when they made the sale on his account.

If they had no right to close the transaction as they sought to do by buying in the wheat on the fourteenth April, the defendants were liable to the plaintiff for damages resulting from the purchase, and from the refusal to purchase, pursuant to the instructions given them by the plaintiff on the sixteenth April, fifty thousand bushels on his account at eighty-seven and three-eighths, as the price on that day had declined to and below that figure, and remained less for at least four days thereafter. So that the plaintiff's instructions may have been accomplished, and, from the purchase so made, the plaintiff would have realized sufficient to reimburse him the full amount of \$3,000 margin he had deposited with the defendants. The relation of the defendants to the plaintiff was that of agency,

Opinion of the Court, per BRADLEY, J.

and so long as he performed his part of the contract the adventure was subject to his control. But the brokers had assumed a responsibility in making the sale. They were responsible for the delivery of the wheat when due, or for the payment of the difference in price to the purchaser if it then became enhanced. And consequently the defendants had the right to protection from the plaintiff, whose duty it was to supply a suitable fund for margin to cover advances in price. If the plaintiff failed within a reasonable time after call for it to furnish the requisite amount for such purpose, the defendants were at liberty to purchase an equal quantity on his account, and charge the plaintiff with any deficiency in case of loss by the transaction. And on the other hand the plaintiff had the right to designate a limit in advancing price at which the purchase should be made within that which his deposits for margin would cover. There were no special stipulations in the arrangements between the parties. Their rights were dependent upon the general principles applicable to such cases. And their opportunities respectively for the protection of their rights in the transaction were, to be reasonable under the circumstances which should arise. The evidence tends to prove that the defendants had on the thirteenth and fourteenth April reason to apprehend an advance in the price of wheat occasioned by rumors of war in Europe; that on those days the market was in an excited condition, and on the fourteenth April the price in the board reached ninety-two and seven-eighths.

In this situation may be seen the reason for the notice to the plaintiff, in reply to his stop order, that the defendants could not carry the sale over night if the market closed near the stop loss limit without further margin. The reason of their apprehension was communicated to the plaintiff. And in the notice of the purchase they stated to him that it was too dangerous to accept the stop order in place of margin, and that they were obliged to close the account to protect themselves, as the plaintiff had limited his loss to \$3,000.

In case of loss beyond the amount of margin supplied,

Opinion of the Court, per BRADLEY, J.

the defendants' protection was dependent upon the responsibility of the plaintiff to pay the balance of the account resulting from the strict observance of his instructions. The situation, as represented by the evidence, presented questions of fact, whether the price mentioned in the stop order was regularly reached on the fourteenth April before the purchase, and, if so, whether the purchase was made in the execution of the order. Also, whether the plaintiff was in default in furnishing margin upon the defendants' call for it. Those two propositions were submitted to the jury with instruction that the defendants were entitled to a verdict if they found either of them in the affirmative, and that if they found both of them in the negative, the plaintiff was entitled to recover. There was some evidence, not here mentioned, essentially bearing upon those questions, and which tended to support the view of the trial court. But as no exception was taken to the submission of those questions to the jury, and none which requires on this review the consideration of the sufficiency of evidence to support a recovery by the plaintiff, it is unnecessary to make further reference to the evidence. The defendants' counsel requested the court to charge "that the plaintiff can only recover damages for breach of contract, and not conversion, and the damage for breach would be the value of the property at the time of the breach, and notice of it." And the court said: "I shall charge that he is entitled to recover the \$2,000 in this action. It is immaterial whether a conversion or breach of contract."

The defendants' counsel excepted, and to the charge "that the plaintiff can recover \$2,000" exception was specifically taken. It was evidently not the purpose of the court to charge that the plaintiff was entitled to recover, nor can the remark of the court following the request be so treated. The court had charged that the plaintiff's right to recover was dependent upon the finding by the jury in his favor on the questions of fact submitted to them as before mentioned. The response of the court to the request was to the effect that if the jury found for the plaintiff he was entitled to recover

Opinion of the Court, per BRADLEY, J.

\$2,000. The transaction in question was speculative. It was an adventure founded upon what is known as "short sale." There was no support for an action for conversion of wheat. In that respect it theoretically differs from a purchase for speculation by a broker for his customer, in which case, if the broker makes an unauthorized sale, the principal may disaffirm it and require the broker to replace the stock or property, and upon his failure to do so the remedy of the principal is to replace it himself, and the advance in the market-price from that at the time of the sale up to a reasonable time to replace it, is the measure of damages. (*Baker v. Drake*, 53 N. Y. 211; *Gruman v. Smith*, 81 id. 25.) The present case was not one of investment on purchase, but a venture on a sale of wheat which the plaintiff did not have, with a view to realize a profit by buying in at a lower price at a future time, or what is practically the same thing, taking the difference between the price at the time of sale and a reduced price subsequently.

In view of the finding of the jury it must be assumed that the purchase by the defendants on the fourteenth April was unauthorized, and for the purpose of the remedy the situation of the plaintiff in respect to the sale previously made by them on his account remained unaffected by such purchase.

They were not at liberty to treat it as made on his account. When, therefore, he gave the defendants instructions, as he did on the sixteenth April, to purchase at eighty-seven and three-eighths, it was their duty to do so, if the state of the market permitted. The fact is not questioned that on that day and for four days following, the market price at the board in Chicago had declined to that and even less, and the wheat could have been purchased pursuant to such instructions. This would have produced for the plaintiff the principal sum of his recovery. And no less a sum would indemnify him for the loss he suffered by the refusal of the defendants to make the purchase as he directed. The court properly held that in the event he was found entitled to a verdict the measure of his recovery should be \$2,000, and interest from

Opinion of the Court, per BRADLEY, J.

April 16, 1885. (*White v. Smith*, 54 N. Y. 522; *Knowlton v. Fitch*, 52 id. 288; *Hess v. Rau*, 95 id. 359.) The defendants were not prejudiced by the charge that it was immaterial whether the recovery was as for conversion or breach of contract. The facts, when found in favor of the plaintiff, required the result given by the verdict. The breach of the contract was in the refusal of the defendants to purchase when and as instructed to do, and the damages resulting from such breach were no less than such amount. The witness Dawson stated that he knew what was the market-price of wheat on the 13th and 14th of April, 1885, and was then asked what price it reached on the thirteenth, fourteenth and fifteenth of that month with reference to the point at which this was margined, to which the defendants objected, on the ground that it is not possible for the witness to know, except by hearsay, as he was in New York. And exception was taken to the reception of the evidence. The answer of the witness was that ninety-two and seven-eighths was the highest he knew of or saw quoted. It did not appear when the objection was taken that the witness was in New York on those days, or that he was not then in Chicago. He stated that he knew the market-price at that time. When it had afterward appeared that the witness was not in Chicago on either of those days, but took his information from a "ticker" in New York, no motion was made to strike out his answer to the question. No error appearing in the ruling at the time it was made, the exception was not well taken. The defendants could not have been prejudiced by this evidence of the witness, as it appeared by other evidence that the highest price reached by the board in Chicago on those days was the same as that stated by him, and that was on the fourteenth of April. The ticker purported to indicate the prices at the board only. The sale, which the evidence tended to prove was made that day for ninety-three and three-eighths, was outside, and between the morning and afternoon sessions of the board. The evidence of the witness to which the objection was taken did not tend to controvert that fact.

Statement of case.

The other exceptions have been carefully examined and there seems to have been no error to the prejudice of the defendants in any of the rulings to which they were taken.

The judgment should be affirmed.

All concur, except PARKER, J., dissenting and POTTER, J. not sitting.

Judgment affirmed.

OSCAR BAUMANN, Appellant, v. MARY G. PINCKNEY,
Respondent.

It seems, an action to compel the specific performance of a contract to sell land may be maintained by the vendee; he is not confined to his remedy at law; and when the answer in such an action does not raise the question of the right of the plaintiff to bring it, and no such question is raised upon the trial, a decision of the court dismissing the complaint, on the ground that plaintiff has an adequate remedy at law, is error.

In such an action it appeared that after the execution of the contract and before the time fixed for performance the defendant gave the plaintiff a verbal option to extend the time of performance for thirty or sixty days provided at the time fixed for performance the plaintiff would increase the purchase-price and pay an additional sum down. Plaintiff attended at the time and place specified and gave notice that he elected to accept the sixty days option and offered to pay the money required. Defendant was not present but was represented by an agent, who was not empowered to sign an extension for sixty days, and it was claimed on her behalf that in no event did the option permit an extension for more than thirty days. Said agent had no evidence of his authority to act for the defendant in any respect. Plaintiff declined to make the payment except to defendant or some one showing authority to receive it. Said agent thereupon tendered a deed and demanded payment of the balance of the purchase-money called for by the original contract, and upon plaintiff's failure to pay, gave notice, that the contract was at an end and that defendant would retain the purchase-money paid down. Plaintiff gave notice that he was ready to pay the additional sum called for by the verbal agreement at any time that defendant, or any one who could justify as her agent, would call for it. *Held*, that plaintiff had a right to be reasonably satisfied as to the authority of any person claiming to act for defendant and also to insist upon an extension in writing before making the payment; and, it being conceded there was an agreement for an extension, if the parties honestly differed as to the time, plaintiff was entitled to a reasonable time within which

Statement of case.

to perform the original agreement; that as plaintiff was not in default defendant could not terminate his rights by a tender of a deed, and having taken an untenable position if she receded therefrom she was bound to give plaintiff notice when and where to perform the original contract, or to complete the modification thereof; and that under the circumstances it was material for the trial court to determine whether the extension was for thirty or sixty days.

The court found it was not material to determine whether the period of extension was thirty or sixty days and refused to find, as requested by plaintiff, it was for sixty days. *Held*, that it must be assumed the refusal to find was because the court deemed it immaterial; and that the refusal was, therefore, an error of law, even if the fact was not conclusively proved.

Plaintiff attempted to make a tender of the amount required with interest on the sixtieth day pursuant to previous notice to the defendant, but the agent designated by her was not present at the place she had appointed. A tender was made as soon as practicable thereafter, but not until the sixty days had expired. *Held*, that as the fault was not that of plaintiff but of defendant, the tender should be regarded as made within the time required.

It seems, that as defendant had repudiated her contract, and declared that all of plaintiff's rights under it were forfeited, he was not bound to make any tender before commencing the action.

The verbal agreement giving plaintiff the option was made on defendant's behalf by the same agent who appeared for her at the time fixed for accepting the option. It was claimed for her, that as plaintiff recognized the agency in the former transaction he could not deny it in the latter. *Held*, untenable; that plaintiff in relying upon the option ran the risk of the agent's authority, and as it appeared that he was duly authorized, and that at the time specified for accepting the option no one authorized by defendant to give an extension for sixty days was present, defendant was in default, provided the option was for sixty days.

Baumann v. Pinckney (14 Daly, 241), reversed.

(Argued January 16, 1890; decided March 4, 1890.)

APPEAL from judgment of the General Term of the Court of Common Pleas of the city and county of New York, entered upon an order made June 6, 1887, which affirmed a judgment in favor of defendant, entered upon a decision of the court on trial at Special Term.

This action was for the specific performance of an executory contract to convey land situate in the city and county of New York.

Statement of case.

The agreement between the parties, dated June 22, 1886, provided that the defendant, in consideration of \$126,000, should convey the premises in question to the plaintiff on the 1st of September, 1886, at 1 o'clock P. M., at the office of John C. Shaw. The sum of \$2,000 was paid down and the remainder of the purchase-money was to be paid upon the delivery of a deed at the time and place aforesaid. Shortly before the day named for performance of the contract, it was verbally agreed between the parties, each acting through a duly authorized agent, that if at the time and place specified for payment and delivery "the purchase-price of the said premises were increased to \$133,000, and a further payment on account thereof of \$10,000 were made, or if the purchase-price were increased to \$131,000 and a further payment on account thereof of \$20,000 were made, the time for performance of the contract should be extended."

Relying upon his right to an extension if he accepted this option in either form, the plaintiff did not prepare to close the contract and pay the remainder of the purchase-price on the first of September, but, by his agent, was present at the hour and place named "with a certified check for \$10,000 prepared to pay the same to the defendant," and "requested to have the time for the performance of the contract extended." The defendant was not present, either in person or through any one whom she had authorized to attend and give an extension for sixty days, the period which the plaintiff claimed was embraced by said option. Mr. Shaw was present and also Mr. Pierce, who claimed to be authorized to receive the \$10,000, but he had not appeared in the business before, and, although in fact duly authorized to act for the defendant to a certain extent, he had no written authority from her and exhibited no evidence of his authority to act for her either in receiving the money, or otherwise. The plaintiff objected to paying the \$10,000 except to the defendant or to some one showing authority from her to receive it. Thereupon Mr. Shaw made a tender of a deed for the premises and demanded payment of the purchase-money unpaid. The plaintiff was

Statement of case.

not prepared to carry out that agreement, so Mr. Shaw gave notice that the contract was at an end and that the defendant would retain the \$2,000, which had been paid and that she refused to recognize any further right of the plaintiff in the premises. The plaintiff, through his agent, informed Mr. Shaw that he was ready at any time that the defendant, or some one who could justify as her agent, applied for the same to deliver to her the said \$10,000. He refused, however, to accept an extension signed either by Mr. Shaw or Mr. Pierce, upon the ground that they were not properly authorized to execute the same, as neither had any power of attorney, or to deliver the check to either of them, even if made payable by indorsement to the defendant.

The parties differed about the length of the agreed extension, the plaintiff claiming that it was to be for sixty days, while the defendant contended that it was to be for only thirty days. They also differed as to whether, if the contract was extended, the principal sum named therein would draw interest during the period of extension. After the first of September the defendant did not notify the plaintiff to perform the contract and she has never returned nor tendered the \$2,000. She owned the premises and had the right to convey them.

A notice of pendency was filed in this action on the second of September, but the summons and complaint, although issued that day, were not served until October twenty-ninth, and in the meantime the defendant, who had no notice of said facts, had contracted to sell the premises to other parties for the sum of \$137,500.

The foregoing facts, among others, were found, in substance, by the trial court, and the defendant admitted by her answer that on the twenty-ninth of October, and before the expiration of the term of sixty days, the plaintiff duly notified the defendant that on the next day at her residence, or at such other time and place as she might designate, he would tender to her the balance of the purchase-price, and that he was willing to bring with him a notary public and a deed in readi-

Statement of case.

ness for her to execute. She thereupon referred him to her agent, Mr. Pierce, at his office, and on October thirtieth and before the expiration of the sixty days the plaintiff called upon him at that place for the purpose of complying with the directions of the defendant, but found the office locked. The plaintiff forthwith gave Mr. Pierce written notice of these facts and requested the defendant or her agent to designate a time and place at which such tender could be made. Mr. Pierce answered, requesting the plaintiff to meet him November first at Mr. Shaw's office, which he did accordingly, and then and there offered to fulfill his part of the agreement and tendered the remainder of the purchase-price, \$131,000. The defendant, through her said agent, refused to accept said sum, and declined to give any deed of the premises upon the ground that the plaintiff had forfeited the contract and all his rights thereunder on the 1st of September, 1886. She also refused to return the \$2,000 paid down on the contract upon the same ground. It appeared that before or at the time that the summons and complaint were served on the defendant a letter was delivered to her from the attorney for the plaintiff, stating that he would be ready to make a tender of the balance of the purchase-price the next day, October thirtieth, and to receive her deed; that he would call upon her with a certified check for the amount and interest on that day at 11 A. M.; that if that day or hour would not suit, or if she demanded bills or gold coin he would accommodate himself to her wishes. He added: "I desire to do anything and everything which may be necessary to make the tender and payment agreeable to you, as to both time and place. Please answer by bearer." The defendant read the letter and referred the bearer to her representative, Mr. Pierce, designating his office, and stating that the matter was entirely in his charge for her.

The uncontradicted evidence tended to show that from June 22 to September 1, 1886, the property rapidly increased in value, and that at the date of the trial in the month of December following it was worth \$160,000.

The trial court found as conclusions of law, among others,

Statement of case.

that time was the essence of the contract, and, as plaintiff had not performed at the time and place provided in the original agreement, he could not maintain the action; that there was no valid contract made for an extension of the time to perform the agreement; that the refusal of the plaintiff to pay the \$10,000 and accept the extension of time from Mr. Shaw or Mr. Pierce, because neither had a power of attorney or other evidence of authority, was based upon untenable grounds and constituted a refusal to accept the option and a failure to perform the contract; that the tender on November first "was insufficient and too late for the purpose of performing the said agreement dated June 22, 1886, as alleged to have been modified by the plaintiff's alleged acceptance of defendant's option;" that the defendant was "entitled to judgment dismissing the complaint in equity because the plaintiff" had "an adequate and complete remedy at law;" and that she was "entitled to judgment in her favor against the plaintiff upon the merits."

The complaint was dismissed upon the merits with costs, and an extra allowance of one per cent upon \$126,000, the value of the property as fixed by the original agreement.

Further facts appear in the opinion.

John E. Parsons for appellant. The finding of law that the defendant was entitled to judgment dismissing the plaintiff's complaint in equity, because he had an adequate and complete remedy at law, is strictly opposed to well-settled principles of equity jurisprudence. (*Baldwin v. Munn*, 2 Wend. 406; *Cockroft v. N. Y. & H. R. R. Co.*, 69 N. Y. 204; *Stone v. Lord*, 80 id. 60; *Losee v. Morey*, 57 Barb. 561; *Town of Mentz v. Cook*, 108 N. Y. 504, 509; *Hollister v. Stewart*, 111 id. 644, 659; *Ostrander v. Weber*, 114 id. 95-102; *Becker v. Church*, 115 id. 562.) It was error for the Special Term to decline to find that the parties differed about the length of the agreed extension, whether it was for thirty or sixty days. (*James v. Cowing*, 82 N. Y. 449.) It was error for the court to put the plaintiff in default upon the ground that he

Statement of case.

objected to pay interest during the extension, and on the further ground that he was required before suit to tender the full consideration, and to keep it good by payment into court. (*French v. Kennedy*, 7 Barb. 452; *Bauder v. Bauder*, id. 560; *Van Rensselaer v. Jewett*, 2 N. Y. 141; *Livingston v. Miller*, 11 id. 80; *Viele v. T. & B. R. R. Co.*, 21 Barb. 381; *Stevenson v. Maxwell*, 2 N. Y. 408; *Cornwell v. Haight*, 21 id. 462; *Blewett v. Baker*, 58 id. 611; *Lawrence v. Miller*, 86 id. 131; *Woolner v. Hill*, 93 id. 576; *Becker v. Boon*, 61 id. 317; *Tipton v. Feitner*, 20 id. 423; *Lester v. Jewett*, 11 id. 453; *Hunter v. Daniels*, 4 Hare, 420, 433; *Bruce v. Tilson*, 25 N. Y. 194.) The Special Term erred in holding that plaintiff was guilty of laches in not serving his summons prior to October 29, 1886. (Code Civ. Pro., § 388; *Peters v. Delaplaine*, 49 N. Y. 362.) The Special Term erred in finding that Mr. Shaw was authorized by the defendant to make an extension agreement. (*Higgins v. Moore*, 34 N. Y. 417; *Parkin v. Thorold*, 16 Beav. 59; *Wells v. Maxwell*, 32 id. 408; 11 Wkly R. 842; *Crawford v. Toogood*, L. R. [13 Ch. Div.] 153; *Clark v. Dales*, 20 Barb. 42, 64; *Goodwin v. M. M. L. Ins. Co.*, 73 N. Y. 480, 493; *Prentice v. K. L. Ins. Co.*, 77 id. 483; *Titus v. G. F. L. Ins. Co.* 81 id. 410, 419; *Fallon v. Lawlor*, 102 id. 228, 232; *Davison v. Jersey Co.*, 71 id. 333, 338; *M. Bank v. Thomson*, 55 id. 7; *Selleck v. Tallman*, 87 id. 106.) The law abhors a forfeiture. (*Livingston v. Tompkins*, 4 John. Ch. 431; *Lyn-den v. Hepburn*, 3 Sand. 668; *Robinson v. Cropsey*, 2 Ed. Ch. 138-147; *Spalding v. Halenbeck*, 39 Barb. 79-88.) Equity, so far from inflicting punishment for a misunderstanding, exists for the purpose of affording relief to parties where it might be held that at law they were remiss. (*Duffy v. O'Donovan*, 46 N. Y. 223; *Quick v. Stuyvesant*, 2 Paige, 84; *Moore v. Smeadberth*, 8 id. 600; *Edgerton v. Peckham*, 11 id. 352; Story's Eq. Jur. [12th ed.] § 38; *Radcliffe v. Warrington*, 12 Ves. 326; *Walker v. Wheeler*, 2 Conn. 299; *Messersmith v. Messersmith*, 22 Mo. 369; *Hancock v. Carlton*, 6 Gray, 39.)

Statement of case.

John C. Shaw for respondent. The time for performance of the agreement and the acts of the parties therein provided to be performed on the first day of September was made the essence of the contract. (*Wells v. Smith*, 7 Paige, 22, 27; *Bullock v. Adams*, 20 N. J. Eq. 372; *Benedict v. Lynch*, 1 Johns. Ch. 370; *Dominick v. Michael*, 4 Sand. 374, 427; *Hubbell v. Von Shoenig*, 49 N. Y. 316; *Coddling v. Wormsley*, 4 T. & C. 52; *Babcock v. Emerich*, 64 How. Pr. 435; *King v. Ruckman*, 20 N. J. Eq. 316, 344-6; *Carter v. Phillips*, 144 Mass. 100; *Goldsmid v. Guelde*, 40 Allen, 239.) Payment of the \$10,000 as a condition of granting the extension or tender of the same to the defendant before suit brought must be proven before this action can be maintained, and the tender must be kept good by paying the same into court. (Pomeroy on Cont. § 387; Pomeroy's Eq. Juris. 453, note; *Becker v. Boon*, 61 N. Y. 317; *Conwell v. Claypool*, 8 Blackf. 124; *Morrison v. Jacoby*, 13 West. Rep. 390; *Tuthill v. Morris*, 81 N. Y. 94, 99-100; *Kortwright v. Cady*, 21 id. 342, 347.) Tender before suit is an essential element and a condition precedent to the bringing of an action for specific performance. (Pomeroy on Cont. §§ 336, 361, 363, 387, 411; Waterman on Spec. Per. 438, 441, 443; Fry on Spec. Per. [3d. Am. ed.] 474, note 1; *Irwin v. Blackley*, 67 Penn. St. 24, 28; *Johnson v. Wygant*, 11 Wend. 48; *Hartley v. James*, 50 N. Y. 38; *Gill v. Payvenstedt*, 7 Am. L. Reg. 672; *Bogardus v. N. Y. L. Ins. Co.*, 101 N. Y. 328; *Wells v. Smith*, 7 Paige, 22.) The plaintiff's refusal or failure to pay the \$10,000 and accept the extension offered to be signed by the defendant's attorney, John C. Shaw, or her agent, Curtis B. Pierce, based upon their want of authority and absence of the defendant, Mary C. Pinkney, was a refusal on his part to carry out the terms of the option, by reason of which alone, the contract was to be extended and such option offered to them, became, as a matter of law, cancelled and terminated. (Pomeroy on Cont. § 387; *Lawrence v. Taylor*, 5 Hill, 107; *Worrell v. Munn*, 5 N. Y. 229; *Newton v. Bronson*, 13 id. 587; *Dunham v. Cudlipp*, 94 id. 129, 134; *Fleischman v. Stern*, 90 id. 110, 114; *White v. Smith*, 46 id. 418;

Opinion of the Court, per VANN, J.

Week's on Attorneys, 373, § 216; *Pringle v. Spaulding*, 53 Barb. 21; *Newton v. Bronson*, 13 N. Y. 587, 594; *O'Connor v. Huggins*, 113 id. 511, 521, 522.) The plaintiff has been guilty of such laches as to deprive him of any right to equitable interference of the court. (*Ally v. Deschamps*, 13 Ves. 223; *S. E. R. Co. v. Knott*, 10 Hare, 122; *Firth v. Greenwood*, 1 Jur. [N. S.] 866; *Rogers v. Sanders*, 33 Am. Dec. 635, 641; *Gate v. Archer*, 42 Barb. 320, 322; *Pomeroy on Cont.* §§ 364, 403, 407, notes.) The refusal to find that the extension was for thirty or sixty days, because the learned judge deemed it immaterial, does not constitute ground for the reversal of the judgment. (*Baldwin v. Doying*, 114 N. Y. 452; *Duncan v. Wright*, 105 U. S. 386; Code Civ. Pro. §§ 1023, 993; *M. Ins. Co. v. Allen*, 121 U. S. 67; *Callanan v. Gilman*, 107 N. Y. 360, 372; *A. C. Bank v. Hunsiker*, 72 id. 252, 258; *Loonan v. Myers*, 13 Daly, 535, 537; *Hogan v. Laimbeer*, 66 N. Y. 604; *Simmons v. Richardson*, 5 Hun, 177; *Smithers v. G. F. Ins. Co.*, 62 N. Y. 85; *Burnap v. Bank*, 96 id. 125, 131.) This case was difficult and extraordinary, and an extra allowance was properly granted. (*Burke v. Candee*, 63 Barb. 552; *Conaughty v. S. C. Bank*, 92 N. Y. 401.)

VANN, J. The only decision of the Special Term that appears in the record before us consists of the findings proposed by the parties marked "found" or "refused," as the case may be, by the judge who presided at the trial. Thus it happened that the court directed that the complaint should be dismissed, both upon the merits and because the plaintiff had an adequate remedy at law. According to a long and unbroken line of decisions, the latter ground is clearly untenable. As early as 1835, it was said by Chancellor WALWORTH that a suit in equity against the vendee to compel a specific performance of a contract to purchase land had always been sustained as a part of the appropriate and acknowledged jurisdiction of a court of equity, although the vendor has, in most cases, another remedy by an action at law upon the agreement to purchase. (*Brown v. Haff*, 5 Paige, 235.) One of the

Opinion of the Court, per VANN, J.

earliest decisions of this court was to the same effect (*Crary v. Smith*, 2 N. Y. 60), and the right of a vendee to maintain specific performance is too well settled to require further discussion. (*Stone v. Lord*, 80 N. Y. 60; Fry on Specific Performance [3d Am. ed.] 8; Pomeroy's Eq. Jur. §§ 30-42.) No such defense was set up in the answer, as the established practice requires, and no such question was raised upon the trial. (*Ostrander v. Weber*, 114 N. Y. 95; *Hollister v. Stewart*, 111 id. 644, 659.)

As the court, however, did not refuse to consider the case, but exercised its jurisdiction by deciding it upon the merits, it may be that the error above pointed out did not prejudice the plaintiff, because the general result may have been right, although that particular conclusion was wrong. We, therefore, proceed to the other questions presented by the record.

After the execution of the original contract the defendant gave the plaintiff a verbal option to extend the time of performance for thirty or sixty days, provided at the time fixed for carrying out the agreement as it then stood, he would increase the amount of the purchase-price and pay an additional sum down. (*Moody v. Smith*, 70 N. Y. 598; *Worrall v. Munn*, 5 id. 229.) The plaintiff acted upon this proposition, which was never withdrawn, attended at the time and place specified prepared to accept and perform it, and gave notice that he elected to accept that branch of the option which provided for an extension of sixty days. It was claimed in behalf of the defendant that in no event did the option permit an extension of more than thirty days. She was not present, but she was represented by two agents, neither of whom was empowered to sign an extension for sixty days, or had any evidence of his authority to act for the defendant in any respect. We agree with the learned trial judge in his conclusion that, under these circumstances, "the plaintiff had a right to be reasonably satisfied as to the authority of any person who claimed to act as the agent of the defendant before paying the said ten thousand dollars" and that "as it was agreed between the parties that there should be an extension, the plaintiff was

Opinion of the Court, per VANN, J.

entitled to a reasonable time within which to perform the original agreement if the parties honestly and in good faith differed as to the length of the extension." We think, however, that these conclusions, together with the facts found by the trial judge, did not justify his refusal to find, as requested, that "the defendant could not terminate the rights of the plaintiff by a tender of the deed made at the time and place mentioned in the contract, after what had passed in reference to an extension."

The plaintiff was not in default. By the invitation of the defendant he attended, through his agent, to modify, not to perform the agreement. He accepted the modification proposed by the defendant, as he understood it, so far as, under the circumstances, he was able prudently to do so. He offered to pay the ten thousand dollars at the time and place required by the option to the person entitled to it, but she was not there to receive it. He offered to pay it to the gentleman who claimed to be her agent, if he would produce evidence of his authority to receive it, but such evidence was not produced. There was no one present who was authorized by her to sign an extension for sixty days, and although she had verbally authorized one who was there to sign an extension for thirty days, there was no evidence of the fact except his assertion. The option was not withdrawn but was recognized by the defendant as still in force.

The plaintiff, as the trial court held, had the right to be reasonably satisfied as to the authority of the assumed agent and he also had the right to insist upon an extension in writing, properly signed, before he paid over the money. (*Marvin v. Wilber*, 52 N. Y. 270; *Rice v. Peninsular Club*, 52 Mich. 87; *Mechem's Agency*, §§ 276, 290; *Dunlap's Paley on Agency*, 346.) No offer was made in behalf of the defendant to satisfy the plaintiff as to the question of authority and his right to an extension for sixty days, under any circumstances, was denied. He gave notice that he was ready to pay over the ten thousand dollars at any time that the defendant, or some one who could justify as her agent, applied for it.

Opinion of the Court, per VANN, J.

Assuming that he was right in his position that the extension was to be for sixty days, what more should he have done? Was he under obligation to pay the money and run the risk, or else be put in default? Was he responsible for the embarrassment of the situation? Was it not the duty of the defendant, either to be at the place appointed in the city where she resided or to have an agent there with proof of his authority, or at least, when the question was raised, to do something to satisfy the plaintiff that it would be safe for him to pay the money? Nothing of this character was done, but on the other hand the plaintiff was notified that the contract was at an end, that the money already paid thereon was forfeited and that he would not be recognized as having any further rights. On the assumption that the extension was to be for sixty days, who was in default or who was next called upon to act at the close of the interview on September 1, 1886? The plaintiff still stood within the lines bounding his legal rights, whereas the defendant had wrongfully repudiated her contract. Having taken an untenable position, if she receded therefrom, she was bound to notify the plaintiff. (*Selleck v. Tallman*, 87 N. Y. 106.)

If, after this, she had notified him when, where and with whom he could perform the original agreement, or complete the modification thereof, prompt action would have been required on his part to save his rights. The defendant, however, made no effort of this kind, but adhered to the position that the plaintiff had no rights that she would recognize. Under these circumstances we think that it was material for the trial court to determine whether the option embraced an extension for sixty days or only for thirty days. If it was for the former period, the defendant was in default, because at the time and place specified for the performance of the original agreement and for the completion of the modification according to the option, she was not present and was not represented by a agent authorized to sign an extension for sixty days. The learned trial judge, however, found that it was not material to determine whether the period of extension was to be for

Opinion of the Court, per VANN, J.

thirty or sixty days and refused to find, as requested by the plaintiff, that it was to be for sixty days. When the finding and the refusal to find are construed together, it must be assumed that he refused so to find because it was immaterial. While he had the power to disbelieve the witnesses for the plaintiff, he had no power to hold that the question was immaterial and on this account to refuse to find as requested. As we have held that the question was material, the refusal, under the circumstances, was an error of law, even if the fact was not conclusively proved. (*James v. Cowing*, 82 N. Y. 449; Code Civ. Pro. § 993.) But the defendant claims that it was not prejudicial error because, even according to the plaintiff's theory as to the period of extension, he did not tender performance in time. He tried to make a tender of the amount required and interest on the sixtieth day, pursuant to previous notice to the defendant, but the agent designated by her was not present at the place she had appointed and the effort was thus rendered futile. A tender was made as soon as practicable thereafter, but not until the sixty days had expired. This was not the fault of the plaintiff, but of the defendant, and for this reason the tender should be regarded as made within the time required. (*Duffy v. O'Donovan*, 46 N. Y. 223; *Hubbell v. Von Schoening*, 49 N. Y. 326.) Moreover, after the defendant had ruptured all relations with the plaintiff by repudiating her contract and declaring that all his rights thereunder had been forfeited, was he bound to make any tender before commencing an action for specific performance? We do not think that it was necessary for him to go through with the form of making an offer of the money when she had virtually declared that she would not receive it. (*Cornwall v. Haight*, 21 N. Y. 462; *Bunge v. Koop*, 48 id. 225; *Blewett v. Baker*, 58 id. 611; *Lawrence v. Miller*, 86 id. 131; *Selleck v. Tallman*, 87 id. 106; *Woolner v. Hill*, 93 id. 576; *Skinner v. Tinker*, 34 Barb. 333.) When the final tender was arranged for, the plaintiff was informed that it would be useless, as the defendant had sold the property and was not in a position to give a

deed. The tender was not refused because not made within the sixty days, but because the contract had been forfeited before the sixty days began to run. (*Duffy v. O'Donovan*, 46 N. Y. 223; *White v. Dobson*, 17 Grat. 262; *Brown v. Eaton*, 21 Minn. 409; *Mattocks v. Young*, 66 Me. 459.)

It is claimed that the plaintiff was in default on the 1st of September, 1886, because he was not present in person, but appeared through agents, who did not produce any evidence of their authority to act for him. This claim is not well founded, because the defendant did not question the authority of those who claimed to represent the plaintiff. If she had, *non constat* due authority would have been shown, or the plaintiff would have been called in. On the other hand, the power of those who assumed to represent the defendant to the extent necessary to consummate the option, was distinctly challenged, but nothing was done or offered to be done to remove the objection.

It is also claimed that as the plaintiff recognized the agency of Mr. Shaw in giving the option, he could not deny such agency when the time for accepting the option arrived. The plaintiff, in relying upon the option, ran the risk of Mr. Shaw's authority in the matter, but it turned out that he had been duly authorized to offer the extension; but at the time specified for accepting the option, it is distinctly found that "no one was present whom the defendant had authorized to attend and give an extension of sixty days." Mr. Shaw's authority, therefore, as well as that of Mr. Pierce, fell short of the requirements of the situation, and the defendant was consequently in default, provided the option was for sixty instead of thirty days. The plaintiff had the right at the time and place specified to give notice that he accepted the option and was ready to perform it, even if there had been no one present, because both the original contract and the option fixed the office and the hour where the former was to be performed and the latter accepted. While the two gentlemen who attended for the defendant had authority to act for her to a certain extent, it was inadequate, as they at the time declared, to per-

Statement of case.

feet the extension for the period insisted upon by plaintiff. If he was justified in thus insisting, he had the right to say, as it was proved that he did say, to Mr. Shaw: "We won't take an extension signed by you or Mr. Pierce, but we will take one signed by Miss Pinckney."

After carefully examining the various grounds upon which the learned counsel for the respondent has urged us to affirm the judgment, we are of the opinion that it should be reversed and a new trial granted, with costs to abide event.

All concur, except HAIGHT, J., dissenting.

Judgment reversed.

DAVID NEWMAN, Respondent, v. THE METROPOLITAN ELEVATED RAILWAY COMPANY, et al. Appellants.

The provisions of the Rapid Transit Act (§ 20, Chap. 606, Laws of 1875) and the General Railroad Act (Chap. 140, Laws of 1850) declaring that commissioners of appraisal shall not, in determining the amount of compensation to be made to parties owning or interested in property acquired for the construction and operation of railways by corporations organized under them "make any allowance or deduction on account of any real or supposed benefits which the party in interest may derive from the construction of the proposed railroad," apply simply to the land actually taken. Whatever land is taken must be paid for at its full market value, with no deduction, although the remainder of the land owner's property may be largely enhanced in value by the operation of the railroad.

In considering, however, the question of damages to the remainder the commissioners must consider the effect of the road upon the whole of that remainder, its advantages and disadvantages, benefits and injuries, and if the result is beneficial there is no damage and nothing can be awarded.

While the easements, which the owners of land abutting upon public streets have therein, are interests in real estate and constitute property, in estimating their value when taken by a railroad company under said acts, they cannot be considered as property separate and distinct from the land to which they are appurtenant, and the right of the property owner to compensation is measured, not by the value of the easements separate from his land, but by the damages which the land sustains because of the loss of the easements.

In estimating the damages, therefore, for the taking away or interfering with such easements, the benefits the abutting property receives from

118	618
129	585
118	618
130	691
118	618
137	305
137	593
137	598
138	551
118	618
140	166
118	618
144	119
118	618
154	557
118	618
162	228

Statement of case.

the operations of the railroad are to be taken into consideration as well as the loss or damage because of the interference with the easements.

An action to recover damages, to plaintiff's leasehold interest in property abutting upon certain streets in the city of New York because of interference with his easements in said streets by the construction and operation of the M. railway was tried on the assumption that said structure caused a permanent impairment of the easements. By the act of 1872 (§ 3, Chap. 585, Laws of 1872) the above provisions of the General Railroad act are made applicable to the G. E. R. R. Co. to whose rights the M. R. Co. has succeeded. Evidence was given tending to show that while the upper parts of the building on the premises had been made less desirable for the purpose for which they were used, *i. e.*, as dwellings, by reason of the defendants' structure, and in consequence thereof the rents had fallen, the first floor, used as a restaurant, had become more desirable for business purposes and greatly enhanced in rental value. The court charged that in estimating the damages to plaintiff's leasehold interests caused by defendants' interference with the easements appurtenant to the premises, the jury had no right to take into consideration any benefits to the premises, "which have arisen by the construction of the road as shown by the evidence." *Held*, error.

(Argued January 29, 1890; decided March 4, 1890.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made June 18, 1887, which affirmed a judgment in favor of plaintiff entered upon a verdict, and affirmed an order denying a motion for a new trial.

At the commencement of this action the plaintiff held a lease of property situated upon the northwest corner of Church and Rector streets in the city of New York. The lease bore date May 1, 1877, and was for the term of fifteen years, with a right of renewal for an additional term of ten years. Upon the property there was a brick building five stories in height, the first floor of which was used as a restaurant, and the other floors for dwellings.

The Metropolitan Elevated Railway was constructed through Church street in front of said premises, and in Rector street there had been erected by the defendants a station from which a covered platform ran to Greenwich street and there connected with the Ninth avenue elevated road.

Statement of case.

The plaintiff claimed in his complaint that the defendants' structure interfered with the ingress and egress to and from his premises, and also impaired the circulation of light and air from the street to his building, and deprived him of its customary and lawful use, and greatly reduced its value to him as lessee.

It was admitted that the action was brought and tried as one to recover in one sum the whole damage sustained and to be sustained from the depreciation of the plaintiff's estate, on the assumption that the defendants' structure caused a permanent impairment of the easements in the street for light, air and access.

The court, having charged the jury that "the damages to plaintiff's leasehold was to be measured by the depreciation of rents caused by defendants' structure, in depriving the premises of the accustomed light, air and egress which it had before said structure was placed thereon," and that in considering the question of damages "the fact that real estate had arisen generally in that district of the city did not relieve the railroad company from the element of damage," was requested by the defendants to charge as follows: "That in estimating the damages to the leasehold interest in this plaintiff caused by the interference by the defendants with the light, air and access appurtenant to the premises, the jury may take into consideration any benefits peculiar to his house which have arisen by the construction of the road as shown by the evidence." To this the court replied: "That I refuse to charge. On the contrary the jury have no right to take any such fact into consideration."

The defendants gave evidence tending to show, and from which the jury might have found, that while the upper parts of the building had been made less desirable for dwellings by reason of the erection of the defendants' structure, and in consequence thereof the rents had fallen, the location of the station in Rector street had, from the greater number of people resorting there, caused the first or store floor of the building to become more desirable for business purposes, and greatly enhanced in rental value.

Statement of case.

Julien T. Davies and *W. Bourke Cockran* for appellant. The court erroneously interpreted the description in plaintiff's lease as including one-half the land forming the bed of Rector street. (3 Kent's Comm. 433; *Lee v. Lee*, 27 Hun, 2; *Babcock v. Utter*, 1 Abb. Ct. App. Dec. 27; *Sibley v. Holden*, 10 Pick. 249; *K. C. F. Ins. Co. v. Stevens*, 87 N. Y. 287; *Jackson v. Hathaway*, 15 Johns. 447; *English v. Brennan*, 60 N. Y. 609; *Bank of Buffalo v. Nichols*, 64 id. 65; 4 Hill, 369; 20 Wend. 149; *Feering v. Irwin*, 4 Daly, 385, 389; *Paton v. N. Y. E. R. R. Co.*, 3 Abb. [N. C.] 306, 342, 345; *Anderson v. James*, 4 Robt. 35; 6 Alb. L. J. 166; *Abendroth v. M. R. Co.*, 19 J. & S. 280; *Burbank v. Fay*, 65 N. Y. 57; *Felton v. Simpson*, 11 Iredell, 84.) The court erred in refusing to charge that in estimating the damages to plaintiff's leasehold interest, caused by defendant's interference with the light, air and access, the jury might take into consideration any benefits peculiar to plaintiff's premises, which had arisen by the construction of the road, as shown by the evidence. (Laws of 1850, chap. 140, § 16; Laws of 1872, chap. 885, § 3; Laws of 1875, chap. 606, § 20; *In re N. Y. E. R. R. Co.*, 70 N. Y. 327; *In re Gilbert*, 70 id. 361; *Story v. L. R. Co.*, 90 id. 122; *Rexford v. Knight*, 15 Barb. 627; *Betts v. City of Williamsburgh*, Id. 252; *Granger v. City of Syracuse*, 38 How. Pr. 308; *Genet v. City of Brooklyn*, 99 N. Y. 296; *Lewis on Eminent Domain*, §§ 14, 52, 471; *Drucker v. E. R. R. Co.*, 106 N. Y. 157, 163, 164; *Gould v. H. R. R. Co.*, 6 id. 558; *C. R. Co. v. Payne*, 16 Barb. 273; *A. R. Co. v. Lansing*, Id. 68; *Cooley on Const. Lim.*, 565; *Setzler v. R. R. Co.*, 112 Penn. 56, 65; *Bangor v. McComb*, 60 Me. 290; *Meacham v. F. Co.*, 4 Cush. 291; *Nicholson v. R. R. Co.*, 22 Conn. 74; *Adams v. R. R. Co.*, 57 Vt. 240; *Paducah v. Stovall*, 12 Heisk. [Tenn.] 1; *Alden v. R. R. Co.*, 55 N. H. 413; *Raleigh v. Wicker*, 74 N. C. 220; *Jacob v. City of Louisville*, 9 Dana, 114; *Shipley v. R. R. Co.*, 34 Md. 336; *Fremont v. Whalen*, 11 Neb. 585; *Page v. C., etc., R. R. Co.*, 70 Ill. 324; *Dupuis v. R. Co.*, 115 id. 100; *Chicago Co. v. Blake*, 116 id. 163; *McReynolds v. R. Co.*, Id. 152; *O. C. R.*

Statement of case.

R. Co. v. Wait, 3 Oregon, 91; *Cleveland v. P. R. R. Co.*, v. *Ball*, 5 O. St. 586; *A. R. R. Co. v. Lansing*, 16 Barb. 68; *T. & B. R. R. Co. v. Lee*, 13 id. 169; *Henderson v. N. Y. C. & H. R. R. Co.*, 78 N. Y. 423; *In re U. R. R. Co.*, 56 Barb. 456; *N. Y. C. R. R. Co.*, v. *Judge*, 15 Hun, 63; *N. Y., L. & W. R. R. Co. v. Haskin*, 29 id. 1; *N. Y., L. E. & W. R. R. Co.*, 49 id. 539; *Lahr Case*, 104 N. Y. 295, 296; *Williams v. N. Y. C. R. R. Co.*, 16 id. 97; *Drake v. H. R. R. R. Co.*, 7 Barb. 508; Laws of 1882, chap. 393; Laws of 1875, chap. 606; *Green v. Neal*, 6 Pet. 291; *Elmendorf v. Taylor*, 10 Wheat, 159; Condensed Rep. U. S. 46.) The court erred in allowing the jury to include in their verdict, which was to be for an amount sufficient to compensate plaintiff for the depreciation in value of his interest in the premises, the amount also of any rents he may have lost. (19 J. & S. 450.)

James M. Smith and *Inglis Stuart* for respondent. If the exception as to the election of defendants as to damages had been tenable, it was subsequently waived. (*Lahr v. M. R. R. Co.*, 104 N. Y. 294.) Where land is bounded on a street, it carries the ownership to the center of the street, subject to the easement in favor of the public. The plaintiff's lease gave him all the rights the owner possessed during its continuance. (*Bissell v. N. Y. C. R. R. Co.*, 23 N. Y. 61; *Perrin v. N. Y. C. R. R. Co.*, 36 id. 120; *Dunham v. Williams*, 37 id. 251.) Plaintiff was entitled to have the street kept open and continued as a public street for the benefit of his abutting property. (*N. Y. E. R. R. Co.*, 90 N. Y. 122; *Lahr v. M. R. R. Co.*, 104 id. 268.) The evidence as to the benefit caused by the erection of the road was properly excluded. (Laws of 1875, chap. 606, § 20.) The exception to the ruling of the court, or the motion to dismiss the complaint, cannot be sustained. (*Ireland v. M. R. R. Co.*, 20 J. & S. 455; *Story v. N. Y. E. R. R. Co.*, 90 N. Y. 122; *Lahr v. M. E. R. R. Co.*, 104 id. 268.) If on review of the whole case it should appear that some technical error should be discovered, the judgment should not be disturbed. The charge of the court to the jury

Opinion of the Court, per BROWN, J.

was as favorable for the defendants as the facts would justify. (*Caldwell v. N. J. S. Co.*, 47 N. Y. 286.) If all the evidence as to the "*opinions*" of the witness is eliminated from the record, the facts proved are sufficient to sustain the verdict of the jury. (*McGean v. M. R. Co.*, 117 N. Y. 219; *Slocowitch v. O. M. Ins. Co.*, 108 id. 62.) The objections and exceptions taken by defendants are too general to be available. They do not specify the ground of objection. In order to be available they must be specific. (*Bergman v. Jones*, 94 N. Y. 51; *Lemeyer v. Turnquist*, 85 id. 516; *Ward v. Kilpatrick*, Id. 413; *Turner v. City of Newburgh*, 109 id. 301.)

BROWN, J. The basis of the court's refusal to charge as requested is to be found in the Rapid Transit Act (chap. 606, Laws 1875, § 20) and in the General Railroad Law (chap. 140, Laws 1850, § 16) which by section 3, chapter 885, Laws of 1872, was made applicable to the Gilbert Elevated Railroad Company to whose rights the Metropolitan railroad company succeeded.

These laws provide that commissioners of appraisal shall not, in determining the amount of compensation to be made to parties owning or interested in property acquired for the construction and operation of railways formed thereunder, "make any allowance or deduction on account of any real or supposed benefits which the party in interest may derive from the construction of the proposed railroad."

What is the true meaning of this provision and how far it is applicable to a case of the character we are considering, is a question we are to determine upon this appeal.

The principle upon which compensation is to be made to the owner of lands taken by proceedings under the General Railroad Law has been frequently considered by the courts of this state and the rule is now established that such owner is to receive, first, the full value of the land taken, and, second, where a part only of land is taken, a fair and adequate compensation for all injury to the residue sustained or to be sustained by the construction and operation of the railroad. (*T & B. R. R. Co. v. Lee*, 13 Barb. 169; *In re C. & S. V.*

HARVARD LAW LIBRARY

NEWMAN v. M. E. R. Co.

Opinion of the Court, per BROWN, J.

R. R. Co., 56 Barb. 456; *In re P. P. & C. I. R.*,
Hun. 345; *In re N. Y. C. v. & H. R. R. Co.*, Jud.
63; *In re N. Y. L. & W. R. Co.*, 29 Hun. 1; *In re*
& *W. R. Co.*, 49 Hun. 539; *Henderson v. N. Y. C. I.*
78 N. Y. 423.)

The first element in the award represents the compensation for land which the railroad takes, and to which it requires consequences of the construction of the road upon property taken, and which the owner still retains. Such damages wholly consequential and to ascertain them necessarily in an inquiry into the effect of the road upon the property consideration of all the advantages and disadvantages arising and to result therefrom.

The rule is well stated in *Lewis on Eminent Domain*, s. 471, as follows: "When part of a tract is taken just compensation would therefore consist of the value of the part taken and damages to the remainder, less any special benefit such remainder by reason of the taking and use of the for the purpose proposed."

In this rule thus settled in this state, and which control awards for taking of land under the General Railroad Act to be found the true application of the statutory provisions which forbids deductions and allowances to be made by commissioners for any real or supposed benefits, which the railroad interested may derive from the construction of the railroad company at its full market value, and from such value deduction can be made, although the remainder of the land owners property may be largely enhanced in value as a result of the operation of the railroad. But in considering the question of damages to the remainder of the land not taken the commissioners must consider the effect of the road upon the whole of that remainder, its advantages and disadvantages, benefits and injuries, and if the result is beneficial, there is no damage and nothing can be awarded.

The rule established under the General Railroad Law must

Opinion of the Court, per BROWN, J.

govern and control awards made under the Rapid Transit Act. The last named act confers upon corporations formed thereunder, the power to acquire property for railroad purposes, and the statutory proceedings prescribed are substantially the same as those under the General Railroad Act and no reason is apparent why the same rule should not apply to proceedings under both acts.

This court has decided that owners of land abutting upon public streets have easements therein for ingress and egress to and from their premises, and for the free circulation of light and air to their property which easements are interests in real estate, and constitute property within the meaning of that term as used in the Constitution.

The easement is the property taken by the railroad company. But in estimating its value it is impossible to consider it as a piece of property, separate and distinct from the land to which it is appurtenant, and the right of the property owner to compensation is measured, not by the value of the easement in the street separate from his abutting property, but by the damages which the abutting property sustains as a result or consequence of the loss of the easement.

It follows that in making an award to a party situated as the plaintiff was with reference to the defendants' railroad, there would be no compensation for property taken beyond a nominal sum, and that his right to recover would rest chiefly upon proof of consequential damages.

An estimate of such damages as I have already shown, involves an inquiry into the effect of the railroad upon the whole property and a consideration of all its advantages and disadvantages. If the rental value of the whole building was shown to have been diminished there was injury for which plaintiff was entitled to recover, but if the diminished rental value of the upper floors was equal or overcome by increased rental value in the store then there was no injury and no basis for a recovery of substantial damages against the defendants.

While the precise question presented by the exception in this case has not heretofore been decided in this court it is cov-

Opinion of the Court, per BROWN, J.

ered by the decisions under the General Railroad Law which have been cited, and the rule established by those decisions has recently been applied in the second judicial department to the case of an elevated railroad. (*In re Brooklyn Elevated R. Co. v. Phillips*, 28 State Reporter 627.)

That case was an appeal by property owners from an award of nominal damages in proceedings by an elevated railroad company to condemn an easement in a street. The court said: "The inquiry necessarily takes in the advantages from the railroad when the extent of the injury is to be based upon the diminution of value by reason of its construction. The basis of appraisal must then be the difference in value between the abutting house before the construction of the railroad and afterward."

In *Drucker v. Manhattan R. Co.* (106 N. Y. 157), this court held admissible evidence offered by the property owner that trade and business had fallen off in the street since the erection of the railroad, and that property was for that reason diminished in value. If such evidence is competent to sustain a recovery it is difficult to see why it is not competent for the railroad company to show that the effect of the road has been to cause an increase in business, and hence an enhancement of the value in abutting property.

The question whether, in awarding damages flowing from the construction of a railroad, its injurious effect upon a part of a residue of a tract of land could alone be considered, has been expressly decided in Illinois. (*Page v. Chicago R. R. Co.*, 70 Ill. 324.)

That case was an assessment of damages for a right of way across a tract of forty acres of land. Compensation was awarded for the part taken, but the evidence showing that the residue of the tract would be enhanced in value by the construction and operation of the road, no consequential damages were allowed to the land owner. The owner claimed that a strip of land next to the railroad was lessened in value by the proximity of the road.

The constitutional provision in Illinois relating to the taking of property for public use is the same as our own, and the

Opinion of the Court, per BROWN, J.

statute under which the assessment was made provided that benefits should not be set off against or deducted from compensation.

The award was sustained on appeal, the court holding "that it was not the damages to a strip lying within a limited number of feet of the road-bed that the jury were required to assess, but the damages, if any, to the entire tract. That the effect of the road upon a part of the tract was not to be considered, but upon the whole tract. "This," the court said, "is not deducting benefits from damages, but it is ascertaining whether there be damages or not." To the same effect is the case of *Oregon Central R. R. Co. v. Wait* (3 Oreg. 91).

The statutes we have considered are founded upon the provision of the Constitution forbidding the taking of private property for public purposes without just compensation. Their purpose is to do exact and equal justice among all citizens of the state, and to award to everyone full and fair compensation for all property taken for public use or injured by the erection of public improvements.

The rule established by the courts and prevailing under the General Railroad Law accomplishes in a broad and liberal manner that object.

The meaning of the expression "just compensation" has not been limited to the value of property actually taken, but has been held to include all consequential injuries which the land owner may sustain by reason of depreciation of value in the residue of the property, by reason of the taking of a part and the construction thereon of the public improvement.

This rule affords full indemnity to the property owner, and leaves him in as good condition as he was before the construction of the road. And this is all that any citizen has a right to ask.

If the rule which the court held in this case is to govern awards made against railroad companies whose structures are erected in the public streets under public authority, when no land is taken, and the compensation is confined to injuries sustained by abutting property, the companies will be compelled

Opinion of the Court, per BROWN, J.

in many instances to pay where no injury has been done, and parties will recover who have sustained no loss. Such a rule has not yet received judicial sanction.

The increase of value resulting from the growth of public improvements, the construction of railroads and improved means of transit accrues to the public benefit generally, and the general appreciation of property consequent upon such improvements belongs to the property owner and the railroad company are not entitled to the consideration of that element in the ascertainment of the compensation it must pay to the abutting proprietor. But the special and peculiar advantages which property receives from the construction and operation of the road, and the location of the stations are elements which enter largely into the inquiry whether there is injury or not, and the jury must consider them and give to them due weight in their verdict.

Between this rule and the statutory provision quoted there is no conflict.

The property owner will in every instance receive the "just compensation" which the Constitution secures to him for his property which is taken or injured by the railroad, and the corporation will be compelled to pay whatever damages result from the erection of their structures and the construction of the road.

Our conclusion is that the defendant was entitled to the instruction requested, and the exception to its refusal was well taken.

The judgment should be reversed and a new trial granted, with costs to abide the event.

All concur; FOLLETT, Ch. J., in result.

Judgment reversed.

Statement of case.

118	629
152	254

CHARLES W. MATHER, Appellant, v. THE EUREKA MOWER
COMPANY, Respondent.

Where a stockholder of a corporation becomes an officer thereof, assumes the duties of the office and performs them without any agreement or provision for compensation, the presumption, in view of his relation and interest, may properly arise that he intends to perform the services gratuitously.

In an action to recover for services as treasurer of a corporation it appeared that plaintiff was a stockholder of the corporation and was a member of a banking firm, the other member of which was also a stockholder and trustee which firm it was understood should have the banking business of the corporation. It also appeared that a by-law of defendant empowered its board of trustees to fix the compensation of its officers, and while that of the secretary was so fixed no compensation was designated or provided for the treasurer. *Held*, the evidence warranted the finding that there was no agreement express or implied to support plaintiff's claim and that the action was not maintainable.

Smith v. L. I. R. R. Co. (102 N. Y. 190), distinguished.

It seems that after a party has declined to produce books and papers duly called for by the opposite party, thus compelling the latter to resort to secondary evidence of their contents, he will not be permitted to introduce them in evidence in his own behalf, to meet such secondary evidence or to give oral evidence for that purpose.

Mem. of decision below, 44 Hun, 833.

(Argued February 24, 1890 ; decided March 11, 1890.)

Appeal from judgment of the General Term of the Supreme Court in the fourth judicial department entered upon an order made January 11, 1887, which affirmed a judgment in favor of defendant entered upon a report of a referee.

The nature of the action and the facts are sufficiently stated in the opinion.

John W. Boyle for appellant. The plaintiff is entitled to recover upon the express promise alleged and claimed to have been made by defendant's president and certain trustees, to pay plaintiff what his services were worth, and for his disbursements for clerk hire and expenses, and upon *quantum meruit*. (*Smith v. L. I. R. R. Co.*, 102 N. Y. 190 ; *Gardner v. Gardner*, 19 Wkly. Dig. 249.) There is no evidence in the case which will sustain or justify the finding that plaintiff's

Statement of case.

services were intended to be gratuitous. (*Smith v. L. I. R. Co.*, 102 N. Y. 190.) The court erred in holding that, under the circumstances of this case, the plaintiff, being a stockholder of defendant's corporation, cannot recover for his personal services as treasurer, in the absence of a by-law attaching a salary to the office, or some action of the trustees providing for his compensation. (*Hooper v. E. Bank*, 30 N. Y. 83-86.) The court erred in allowing defendant to contradict by oral testimony the evidence given on behalf of plaintiff, and to show orally the contents of some of the books and papers which defendant had refused to produce. (*Platt v. Platt*, 58 N. Y. 649; *Tyng v. U. S. S. & T. & B. Co.*, 1 Hun, 161.) The referee erred in finding that the personal services of the plaintiff were intended to be gratuitous, and were performed by him without expectation on his part, and without agreement or understanding on the part of defendant that he should receive any compensation therefor. (*Mason v. Lord*, 40 N. Y. 476, 484; *Beck v. Sheldon*, 48 id. 365.)

Cookinham & Sherman for respondents. The general presumption is that officers of corporations, who are stockholders, serve without compensation. (*Kilpatrick v. P. F. B. Co.*, 49 Penn. St. 118; *I. L. Co. v. Hough*, 91 Ill. 63; *E. M. Co. v. Browne*, 58 Ga. 240; *Cheney v. L. B. & M. R. W. Co.*, 68 Ill. 570; *L. Association v. Stonemetz*, 29 Penn. St. 534; *N. Y. & N. H. R. R. Co. v. Ketchum*, 27 Conn. 170; *Henry v. R. & B. R. R. Co.*, 27 Vt. 435; *Butts v. Woods*, 37 N. Y. 317; *M. F. G. R. R. Co. v. Banegan*, 40 Ind. 361; *Smith v. L. I. R. R. Co.*, 102 N. Y. 190.) The appellant cannot recover, for the reason that he, being a stockholder, is presumed to have knowledge of the by-laws under which he acts and takes his office subject to them. The by-laws fixed no salary for the treasurer of the defendant. (Potter on Corp. § 79; *Adrianse v. Roome*, 52 Barb. 399; *Risley v. I. & B. & W. R. R. Co.*, 4 T. & C. 13; *S. C. M. Association v. Meredith*, 49 Md. 389; *L. & C. R. R. Co. v. Cheeney*, 87 Ill. 447; *L. & T. Ins. Co. v. M. F. Ins. Co.*, 7 Wend. 31-34; *Alexander v. Cauldwell*, 83 N. Y.

Opinion of the Court, per BRADLEY, J.

480.) The exception of the appellant to the first conclusion of law of the referee is not good, for the reason that a person who is a stockholder and officer of a corporation is presumed to know what the by-laws are. (*Adriance v. Roome*, 52 Barb. 399; *Risley v. I. B. & W. R. R. Co.*, 4 T. & C. 13; *Potter on Corp.* § 79.) The respondent had the right to withhold the books when noticed to produce them, and the only effect it had upon the appellant was to allow him to give secondary evidence of their contents if he so chose. (1 *Greenleaf on Ev.* § 560; *Tyng v. U. S. S. & T. B. Co.*, 1 Hun, 161; 60 N. Y. 644.)

BRADLEY, J. The plaintiff was the first treasurer of the defendant, a manufacturing corporation, and was appointed as such in April, 1884, entered into actual service in July following, and served about ten months. He sought, by this action, to recover compensation to which he claimed he was entitled. The referee found that the plaintiff's services were performed without any expectation on his part, or any agreement or understanding that he should receive compensation, and that they were intended to be gratuitous. And, as a conclusion of law, the referee determined that the plaintiff was not entitled to recover any sum for his services as treasurer, but allowed to him seventy-five dollars for clerical services of another employed by him as bookkeeper. The value of the plaintiff's services was found by the referee to have been \$300. The main question upon the merits is whether the conclusion that there was no agreement, express or implied, to support the plaintiff's alleged claim, was warranted by the evidence.

The fact that the plaintiff was appointed or employed as treasurer by the defendant, and that he performed beneficial services for the defendant, presumptively entitled him to payment of their value. (*Smith v. Long Island R. R. Co.*, 102 N. Y. 190.) And when that appeared the burden was with the defendant to relieve itself from liability. This it sought to do by making it appear that the plaintiff was a stockholder of the defendant; that he was a member of a banking firm of

Opinion of the Court, per BRADLEY, J.

A. D. Mather & Co., composed of himself and another, who was also a stockholder and one of the trustees of the defendant; and that it was understood that such firm should have the banking business of the defendant. The further fact appeared that by a by-law of the defendant the power was given to the board of trustees to fix the compensation of its officers, and while that of secretary was so fixed, no compensation for the treasurer was designated, and no provision made by the board in that respect.

It is well settled that a director of a corporation is not entitled to compensation for services performed by him, as such, without the aid of a pre-existing provision expressly giving the right to it. They are the trustees for the stockholders, and as such have the management of the corporate affairs. And to permit them to assert claims for services performed and then support them by resolution, would enable the directors to unduly appropriate the fruits of corporate enterprise. It would clearly be contrary to sound policy. The same reason may not exist for the application of the rule to a stockholder not a director, who has become an officer of the corporation. But he has a pecuniary interest in its management and business. And when he assumes the duties of the office, and performs them without some agreement or provision for compensation, the presumption in view of his relation and interest may properly arise that he performs the official services gratuitously. This proposition cannot be made dependent upon the proportionate amount of the stock held by him. If the officer expects to have compensation, and the corporation intends to pay him for his official services, it may easily be provided for by resolution or agreement before he enters upon his services. This is at all events a salutary rule, as applied to an officer who is a stockholder of the corporation. (*Loan Assn. v. Stonemetz*, 29 Penn. St. 524; *Kilpatrick v. Penrose Ferry Bridge Co.*, 49 id. 118; *Smith v. Putnam*, 61 N. H. 632; *Gill v. N. Y. C. Co.*, 48 Hun, 524; *Barril v. C. I. & W. Co.*, 50 id. 257.) In such case there may be presumed to exist a reason, in the fact, of such relation and interest, to induce

Opinion of the Court, per BRADLEY, J.

him to assume and exercise the duties of the trust, not dependent upon compensation for services when nothing appears to the contrary. The plaintiff had the relation of stockholder, and in addition to his interest as such in the corporation he had a further interest as banker in having the benefit, such as it might be, of doing the banking business which the company might furnish. In view of those considerations and the further fact that he accepted the office and performed its duties without any express understanding that he should have compensation, the referee was permitted to conclude, as he did, that the plaintiff accepted the office of treasurer without any view to compensation and performed the services gratuitously. The conflict of evidence bearing upon that subject was disposed of in the court below, and can have no consideration on this review.

In *Smith v. Long Island Railroad Company*, the plaintiff who performed the duties of secretary of the defendant was neither a stockholder or director of the defendant, and, as the court there remarked, stood in no relation to the company which made it his interest to serve it without compensation.

In the present case several exceptions were taken to the reception of evidence. After the defendant had declined to furnish the books and papers called for by the notice of the plaintiff to produce them, the defendant could not properly be permitted to introduce them as evidence in its own behalf to meet the secondary evidence of the plaintiff as to their contents, or to give oral evidence to that effect for such purpose. (*Bogart v. Brown*, 5 Pick. 18; *Tyng v. U. S. S. & T. B. Co.*, 1 Hun, 161.) The evidence given by the defendant having relation to what appeared in the books and papers embraced in the notice to produce, did not tend to contradict the evidence on the part of the plaintiff in any material respect, and no harm could have in any manner resulted from it to the plaintiff.

All the exceptions have been carefully examined, and none of them seem to point to any error prejudicial to the plaintiff.

The judgment should be affirmed.

All concur, VANN, J., in result; FOLLETT, Ch. J., not sitting.

Judgment affirmed.

Statement of case.

THE TRUSTEES OF THE FREEHOLDERS AND COMMONALTY OF
THE TOWN OF BROOKHAVEN, Appellants, v. EGBERT T.
SMITH, et al. Respondents.

To constitute an equitable estoppel it is not necessary that there should be false representations or concealment of material facts, or that the party sought to be estopped should design to mislead; it is sufficient if his act was voluntary and calculated to mislead, and actually has misled another acting in good faith.

A declaration which might not amount to an estoppel at the time it was made, may become such by ratification or acquiescence,

If one is induced to purchase lands by the acts or representations of another designed to influence his conduct and creating a reasonable belief on his part that he is thereby acquiring a valid title to the same, under which he acts, the party who thus influenced him is estopped from setting up title in himself, existing at the time of the purchase, against that of the purchaser

In an action to recover lands under water of Great South bay, Long Island, plaintiff claimed title under the Nicholls charter of 1666, and the Dongan charter of 1686, to the inhabitants and freeholders of the town of Brookhaven; defendants claimed under two Indian deeds, dated April 8, 1692, and April 9, 1693, and a patent from the governor-in-chief of the Province of New York to S., dated October 9, 1693, which included the land in question. Defendants proved from the town records the following facts: At a town meeting held March 29, 1693, it was voted that S. might purchase and peaceably enjoy^d the lands covered by the said grants. At a meeting of the trustees of said town, held November 27, 1693, S. "did cause his patent to be read before the trustees above said, and each and every one did declare that they had nothing to object against the limits, bounds, powers, privileges, within the said patent contained." On May 1, 1694, "being election day," S. caused his patent to be publicly read before the freeholders of the town, and it was "voted and agreed by the trustees and freeholders above said, that they do on the towns behalf agree, and forever acquiesce in the limits and bounds of the said patent." On September 21, 1693, S. and the trustees of the town entered into an agreement which recited the purchase by S., with consent of the town, of said lands and then fixed and defined the north boundary line between the lands of S. and of the town. It also appeared that, on the supposition that he had title, S. entered into possession, and he and his descendants have had undisputed possession since. *Held*, that plaintiff was estopped from claiming title to the land; that to constitute the estoppel it was not essential that the declaration of the town as to its title should have preceded the date or delivery of the deed;

118	684
f 157	609
j 157	615
118	684
160	59
118	684
172	1267
118	634
78 AD	587

Statement of case.

that the various declarations of the town through its trustees and town meetings must be construed as a single representation; also, that no distinction was to be made between the upland and the bay.

Plaintiff claimed that there had been such a user by the town of the bay as indicated that title thereto was in the town by acquiescence of all parties; to establish such user they introduced in evidence certain resolutions of the trustees of the town in reference to the control and regulation of fishing in the bay, beginning in 1759, and ending in 1768; also acts of the inhabitants of the town in taking fish and oysters from the bay. There was no evidence that anyone ever acted under these resolutions, or that they were ever brought to the knowledge of S., or that he ever heard of them. The evidence that the inhabitants of the town took fish from the bay was confined mainly to the period between 1862 and 1879, when the town under an agreement with defendant S., controlled the bay. A few instances prior to 1862 were proved, but it was not shown that the persons acted under authority from the town. There was no evidence that defendant S., or any of his ancestors, ever by word or act admitted the right of the town to control the fishing in the bay. In 1862 the town, under an agreement with defendant S., took from him a deed of the property in question; this agreement was subsequently annulled by the parties thereto. *Held*, that the evidence failed to show user by plaintiff; and that a refusal to submit the question to the jury was not error.

Trustees etc., v. Strong (60 N. Y. 56); *Hand v. Newton*, (92 N. Y. 88), distinguished.

(Argued January 22, 1890; decided March 11, 1890.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made February 15, 1887, which affirmed a judgment in favor of defendant, entered upon a verdict directed by the court.

This action is in the nature of ejectment to recover land under water of a part of Great South bay, Long Island.

The plaintiff's title rests upon two colonial charters granted to the inhabitants and freeholders of the town of Brookhaven.

The first was granted March 7, 1666, by Governor Nicholls, and conveyed "all that tract of land which already hath been or that hereafter shall be purchased for and on behalf of the said town, whether from the native Indian proprietors or others, within the bounds and limits hereafter set forth and expressed."

The said tract extended "north to the Sound and south to the sea or Main Ocean" and included the greater part of the

Statement of case.

large body of water lying on the south side of Long Island and known as the Great South bay.

The second charter was granted by Governor Dongan, December 27, 1686, and was confirmatory of the Nicholl charter. It granted the same tract of land together with "the marshes, swamps, rivers, waters, lakes, ponds, creeks and harbors," etc. "Saving to his most sacred Majesty aforesaid his heirs and successors all the tracts and necks of land that lieth to the south within the limits and bounds aforesaid that remain unpurchased of the native Indians."

The defendant Egbert T. Smith made his title through two Indian deeds, dated respectively April 8, 1692, and April 19, 1693, made to William Smith, defendant's ancestor, the first of which covered the premises in dispute, and a deed or patent from Benjamin Fletcher, Captain-General and Governor-in-Chief of the Province of New York to William Smith, dated October 9, 1693.

He further introduced in evidence in support of his title, the following extracts from the public records of the town :

"Town and William Smith.

"At a town meeting upon the 28th day of March, 1693, Col. William Smith of Brookhaven, did then and there acquaint the town as he did before that with the Governor's license he had purchased and intended to purchase divers' tracts of land unpurchased of the Indian natives by the town and within the limits of their patent and reserved to their Majesties by their patents, and did require to know whether the town laid any claim to the same or not and whether they were content that he the said Smith should purchase and peaceably enjoy the same. Voted and agreed that the above said Col. Smith may purchase and peaceably enjoy as aforesaid."

"At a meeting of the Trustees of the freeholders and Commonalty of the Town of Brookhaven upon the 27th day of November, 1693 ; at the same time Col. William Smith did cause his patent to be read before the Trustees above said, and each and every of them did declare that they had nothing to object against the limits, bounds, powers, privileges, within the said patent contained."



Statement of case.

99 N. Y. 102, 107; *Sidell v. Grand Jean*, 101 U. S. 412; *D. & P. R. R. Co. v. Litchfield*, 23 How. Pr. 66; *C. R. B. Co. v. W. B. Co.*, 11 Pet. 420; *Woods Case*, 1 Coke, 40, 43, 51; *King v. Copper*, 5 Price, 217, 260.) If the defendants were entirely right in their interpretation of the language of those ancient patents, nevertheless the force of the user which was proved, really extending over a period of two centuries, would establish the plaintiff's title. (*Livingston v. Ten Broeck*, 16 John. 14; *Hale de juris Maris*, Hargrave's Law Tracts, 33; *Jackson v. Wood*, 13 John. 347; *Adams v. Frothingham*, 3 Mass. 360; *Broom's Leg. Max.* 300; *Codman v. Winslow*, 10 Mass. 149; *Bayard v. Goodwin*, 2 id. 475.)

Nicoll Floyd for appellants. The town of Brookhaven was by its patents vested with the absolute ownership of the navigable tide-waters and the soil beneath them, within its limits. (*Cavazoz v. Trevino*, 6 Wall. 773; *Groot v. Moak*, 26 Hun, 380; *Adams v. Frothingham*, 3 Mass. 382; *Com. v. Roxbury*, 9 Gray, 492; *Jackson v. Muers*, 3 Johns. 388; *Martin v. Waddell*, 16 Pet. 411, 412; Coke's Inst. 4b; Hall on Seashores, 2-6; Chitty on Prerog., chap. 8, § 2; Angell on Tide-waters, 20, 247; Gould on Waters, § 4; *Arnold v. Mundy*, 1 Halsted, 1; *Martin v. Waddell*, 16 Pet. 367; *Gough v. Bell*, 1 Zab. 156; 2 id. 441; 3 id. 624; *Barney v. Keokuk*, 94 U. S. 324; Kent's Com. 343, 373; *Furman v. Mayor, etc.*, 5 Sand. 16; 10 N. Y. 567 *Rogers v. Jones*, 1 Wend. 237; *Brookhaven v. Strong*, 60 N. Y. 56; *Hand v. Newton*, 92 id. 88; *Robins v. Ackerly*, 91 id. 98; *Denton v. Jackson*, 2 Johns. Ch. 320; *Foster v. Rhoads*, 1 Johns. 191; *Johnson v. McIntosh*, 8 Wheat. 543; *Lansing v. Smith*, 4 Wend. 9; *Gould v. H. R. R. Co.*, 6 N. Y. 522; *People v. Tibbetts*, 19 id. 523; *Ex parte Jennings*, 6 Case, 518; *Smith v. City of Rochester*, 92 N. Y. 463; *Steers v. City of Brooklyn*, 101 id. 51; *Lawrence v. Delano*, 3 Sand. 333; Malone on Real Prop. 149; Black. Com. 37; *Jackson v. Lawton*, 10 Johns. 23; *Wilson v. Imloes*, 11 G. & J. 351.) The ownership of the disputed territory once vested in the town under its patent, it remains there,

Opinion of the Court, per BROWN, J.

unless it has been disposed of by the town voluntarily, or has been lost by operation of law. It has never been disposed of, nor has it been lost. (*People v. Van Rensselaer*, 9 N. Y. 291; *Bigelow on Estoppel*, 484; *Waring v. Sanborn*, 82 N. Y. 604.) The court erred in holding at the trial that the grant in the patent to the town of Brookhaven was limited to such lands as had been or should be thereafter purchased by the town and the waters, etc., appurtenant thereto, and that from the Smith patent it was to be inferred that the town had never purchased the tract of land therein granted, and therefore, never got title to the bay, creeks, beach, etc., appurtenant to that tract of upland, and hence no title to the *locus*. (*Rogers v. Jones*, 1 Wend. 237; *Brookhaven v. Strong*, 60 N. Y. 56; *Laws of 1813*, 46; *Hand v. Newton*, 92 N. Y. 88.)

Wilmot M. Smith for respondents. There was no error in the court refusing to submit the case to the jury upon the requests of the plaintiffs. (*Herring v. Hoppock*, 15 N. Y. 413.)

BROWN, J. This court decided in *Trustees of Brookhaven v. Strong* (60 N. Y. 56), and again in *Hand v. Newton* (92 N. Y. 89), that under the town charters it had title to the land under the waters of the navigable bays and harbors within the limits defined in those instruments. Those cases, however, afford no aid to the solution of the question now presented, for the reason that in the first action the patent under which defendant claims was a part of the town's title to the land then in dispute, and the second involved the title to land under water on the north side of the island entirely outside of the limits of defendant's grant.

The learned counsel for the appellant claims that the patent to William Smith did not in terms convey any part of the bay. This proposition cannot be sustained. The grant recites the issuing of a warrant to the surveyor-general of the province to survey and lay out, several necks and tracts of land, beach, bay, etc., situate on the south side of the island formerly called Long Island, etc. That said surveyor-general had surveyed

Opinion of the Court, per BROWN, J.

and laid out "said necks and tracts of land * * * bay and islands within said bay bounded westward from the main sea or ocean etc." It then grants to Col. William Smith and his heirs the "afore recited necks and tracts of land within the respective bounds before mentioned, together with the waters, rivers, lakes, creeks, harbors, bays, islands, fishing fouling etc., and all rights * * * privileges * * * and appurtenances whatsoever to the aforesaid necks and tracts of land, bay, beach and islands within said bay" etc., etc.

It will thus be seen that the bay is granted by express terms.

The bay is not described as appurtenant to the neck and tracts of land, but the bay is conveyed with all the benefits and privileges appertaining thereto.

Almost identical language is used in the Dongan charter to the town and this court held it sufficient to convey the title to land under water (*Brookhaven v. Strong, supra*), and that decision must control the construction of the grant to Smith.

The land in dispute being, therefore, within the grant to William Smith, I think the case presents all the elements of an equitable estoppel against the town. It is not necessary, as is claimed in one of the briefs submitted to us by the appellant, to constitute an equitable estoppel that there should be a false representation or concealment of material facts. Nor is it essential that the party sought to be estopped should design to mislead. If his act was voluntary and calculated to mislead and actually has misled an other acting in good faith that is enough. (*Man'f'rs. & Traders' Bank v. Hazard*, 30 N. Y. 226; *Cont'l. Nat. Bk. v. Nat. Bk. Commonwealth*, 50 N. Y. 575.) Nor is it essential that the declaration of the town as to its title to the land described in Smith's patent should have preceded the date or delivery of the deed, (*Cont'l. Nat. Bk. v. Nat. Bk. of Commonwealth, supra*, 583-598; *Casco Bank v. Keene*, 53 Me. 103.)

If those declarations affected the conduct of Smith, with reference to the land purchased, so that it would be unjust or injurious now to those who have succeeded him to permit the plaintiff to set up its title contrary to the truth of its declara-

Opinion of the Court, per BROWN, J.

tion, it is sufficient. That which might not amount to an estoppel at the time the declaration is made, may become such by ratification or acquiescence. (Bigelow on Estoppel [5th ed.] 650; *Faxton v. Faxon*, 28 Mich. 159.)

The authorities in this state are all harmonious on the subject of estoppel *in pais*.

When a party, either by his declarations or conduct, has induced a third person to act in a particular manner, he will not afterwards be permitted to deny the truth of the admission if the consequence would be to work an injury to such third person or to some one claiming under him. (*Wendell v. Van Rensselaer*, 1 Johns. Ch. 344, 354; *Storrs v. Barker*, 6 id. 166; *Town v. Needham*, 3 Paige, 545; *Dezell v. Odell*, 3 Hill, 215; also see dissenting opinion of Judge BRONSON approved in 47 N. Y. 500; *Brown v. Sprague*, 5 Denio, 545; *Plumb v. Cattaraugus C. M. Ins. Co.*, 18 N. Y. 393; *Welland Canal Co. v. Hathaway*, 8 Wend. 483; *Thompson v. Blanchard*, 4 N. Y. 303; *Cont'l Nat. Bk. v. Nat. Bk. Commonwealth*, 50 id. 575; *Armour v. M. C. R. R. Co.*, 65 id. 111-122; *N. Y. Rubber Co. v. Rothery*, 107 id. 310-316.)

Numerous cases where this principle has been applied to real estate are collected in Washburn on Real Property (vol. 3, chap. 2, § 6), to which reference is made. When so applied it is as effectual as a deed would be from the party estopped.

The general rule deduced from all the authorities, is that if one is induced to purchase land by the acts or representations of another designed to influence his conduct, and creating a reasonable belief on his part under which he acts that he is thereby acquiring a valid title to the same, the party who thus has influenced him is estopped from setting up his own title, existing at the time of the purchase, against that of the purchaser.

The various declarations of the town through the trustees and town meetings must be construed as a single representation. They were all *in pari materia* and had one purpose, viz., to inform Smith that the town made no claim to the land he desired to purchase.

Opinion of the Court, per BROWN, J.

The "necks and tracks" of land reserved to the Crown by the Dongan charter could not be identified except by a declaration by the town, or through the medium of some legal proceedings against the town. We have the fact that when the survey had been completed and embodied in the patent, it was read to the town meeting and approved and the town voted "to agree and acquiesce in the bounds of the patent."

It described particularly "the bay," and the patent obligated Smith to pay an annual quit rent to the Crown.

There can be no reasonable doubt that Smith sought and obtained the resolutions of the town meetings as muniments of his title, and that they were intended by the town to be such. They were calculated to and undoubtedly did influence the purchase, else why was the inquiry made and answered.

In the most deliberate manner possible the town not only disclaimed ownership, but agreed and acquiesced in the purchase, and in the boundaries of the land conveyed. I am unable to see any distinction to be made between the upland and the bay. Both were conveyed by the same instrument, and the resolution of the town meeting applied as much to one as to the other.

In reliance upon the declaration of the town, and on the supposition that he had title, Smith entered into possession, and he and his descendants, on the faith of these declarations, have had undisputed possession of the land for nearly 200 years. The town cannot now be permitted to deny the truth of its declarations and assert its title to the premises in dispute.

To repel, however, the presumption arising from the transactions I have alluded to, so far as it is made applicable to the waters of the bay, the appellant appeals to the acts of the parties under their respective patents; and it is claimed that the evidence shows such user by the town of the bay as indicates that title thereto was in the town by the acquiescence of all parties, and that if the evidence on this branch of the case was not conclusive, it was at least of such a character as to require the submission of the question to the jury.

The application of the rule which denies the right of the

Opinion of the Court, per BROWN, J.

appellant to assert at the present time its title to the bay, depends very largely upon its acquiescence in the ownership of Smith and his descendants.

I have assumed such acquiescence in the view I have thus far taken of the case, but if the fact be as claimed by the appellant, the conclusion I have reached probably could not be sustained in the absence of a finding on that question by the jury.

The evidence of the question of user is of two kinds: *First*. Certain resolutions of the trustees of the town in reference to the control and regulation of fishing in the bay; and, *second*, acts of the inhabitants of the town in taking fish and oysters from the bay.

The first covers a period of about ten years only, beginning in 1759 and ending in 1768.

There is no evidence that any one ever acted under the resolutions of the trustees, and none that they were ever brought to the knowledge of the defendant's ancestors, or that he ever heard of them. The evidence that the inhabitants of the town took fish from the bay is confined mainly to the period between 1862 and 1879, when the town, under an agreement with the defendant Egbert T. Smith, controlled the bay.

There are a few instances earlier than 1862, but it was not shown that the persons acted under authority from the town. I can find no evidence in the case that the defendant Smith, or any of his ancestors, ever, by word or act, admitted the right of the town to control the fishing in the bay, and in the absence of evidence tending to show that fact, no resolutions passed by the trustees of the town, and no acts of the inhabitants in taking fish from the bay, can be regarded as indicative of title in the town.

There is no fact in the record inconsistent with the claim of the original patentee, or any of his descendants, of that full title which was conveyed by the original grant.

We think the evidence fails to show any user of the property in dispute by the town.

For upwards of sixty years after the grant to William Smith, so far as the case informs us, if there was not absolute acquiescence in Smith's title, there was at least no claim or assertion by the town of a right to control the bay.

The greater part of the bay was, during the last century, conveyed to the town by the grandson of the original patentee, and the town now holds such rights as it has there under those conveyances.

In 1862 the town took from the defendant Egbert T. Smith a deed for the property now in dispute, agreeing, in consideration of that conveyance, to lease out the privileges in the bay and pay one-half the net proceeds to said defendant.

The town records inform us, with reference to that conveyance, that "Hon. Egbert T. Smith offered to release to the town all that part of the bay, etc., on the same terms as his ancestor released to the town the East bay in 1790, so that hereafter the town should have full control of all the bays on the south side of the island." It was thereupon resolved "to accept the offer," and the clerk was directed to embrace in one indenture the conditions of the grant to be signed by both parties.

Smith becoming dissatisfied with the agreement and, threatening litigation, the agreement was annulled and the property reverted to him.

This agreement established a dividing line between the land in dispute and the East bay.

We think all these transactions, from the date of the patent to Col. William Smith to the annulling of the last agreement between the parties, speak one language on the question of title and show acquiescence on the part of the town in the grant to Smith.

The few resolutions of the board of trustees passed 150 years ago, and the few instances of the town's people asserting a right to fish in the bay, established only that there was occasional dissatisfaction and a show of resistance to Smith's title.

But the right under that title was always maintained and exercised by exacting small payments for individual privileges and by occasional leasing of the bay.

Statement of case.

There was, on the evidence, no question for the jury, and the court rightly disposed of the case on the legal questions alone.

The judgment should be affirmed, with costs.

All concur, BRADLEY and HAIGHT, J.J., in result.

Judgment affirmed.

JOSEPH SMITH, Respondent, v. THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Appellant.

In an action to recover damages for injuries alleged to have been caused by defendant's negligence, it appeared that plaintiff, one of defendant's employes, while in the discharge of his duty, was seriously injured by the collision of an engine, on which he was riding, with an unattended freight car, which was one of three, placed upon a side-track to be loaded; they were left by defendant's employes coupled together, with the brakes on the car in question and one other set. The parties loading them, for their own convenience, moved the two other cars, leaving this car where it was originally placed. During the night of the accident the car was moved onto the main track, as the evidence tended to show, by the wind which had blown hard during the night. The only ground upon which the claim of negligence was based was that the brake on the car was defective in this, that the brake-shoes on it had worn thin. Plaintiff gave no evidence tending to show that the brake could not be applied or that when applied, it was not effective. One of defendant's brakemen testified he applied the brake and it worked well, and two other witnesses testified they saw said brakeman apply the brake. *Held*, that the court erred in submitting the question of defendant's negligence to the jury; that defendant's duty to its employe was not measured by the thickness of the brake-shoe, but it was simply bound to furnish brake-shoes effectual for the purpose for which they were used, and it was incumbent upon plaintiff to prove facts permitting the inference that this brake was not effectual.

(Argued February 24, 1890; decided March 11, 1890.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department entered upon an order made the first Tuesday of June, 1887, which affirmed a judgment in favor of plaintiff entered upon a verdict and affirmed an order denying a motion for a new trial.

Opinion of the Court, per PARKER, J.

This was an action to recover damages for injuries received by plaintiff through the collision of one of defendant's locomotives, upon which he was working, with a freight car.

The facts are sufficiently stated in the opinion.

Edward Harris for appellant. The plaintiff failed to make out a cause of action and the refusal to non-suit was error. (*DeGraff v. N. Y. C. & H. R. R. R. Co.*, 76 N. Y. 125; *Webster v. R., W. & O. R. R. Co.*, 115 id. 112; *Harvey v. N. Y. C. & H. R. R. R. Co.*, 88 id. 481; *Byrnes v. N. Y., L. E. & W. R. R. Co.*, 113 id. 251; *Pease v. C. & N. Y. R. R. Co.*, 61 Wis. 163; *Searles v. M. R. Co.*, 101 N. Y. 661; *Taylor v. City of Yonkers*, 105 id. 202-208; *Whittaker v. D. & H. C. Co.*, 23 N. Y. S. R. 405.)

James C. Smith for respondent. Defendants owed to its employes a duty to furnish suitable and safe machinery and appliances for their use. (*Laning v. N. Y. C. & H. R. R. R. Co.*, 49 N. Y. 521; *Kirkpatrick v. N. Y. C. & H. R. R. R. Co.*, 79 id. 240; *Fuller v. Jewett*, 80 id. 46; *Kain v. Smith*, Id. 458; *Bushby v. N. Y. L. E. & W. R. R. Co.*, 107 id. 374.) Even if negligence on the part of a fellow-servant of the plaintiff, or of an employe of the warehousemen had co-operated with that of the defendant to produce the injury, the defendant would not have been relieved thereby from liability for the consequences of its own neglect. (*Plike v. B. & A. R. R. Co.*, 53 N. Y. 549; *Booth v. B. & A. R. R. Co.*, 73 id. 38; *Cone v. Del., L. & W. R. R. Co.*, 81 id. 206; *Ellis v. N. Y., L. E. & W. R. R. Co.*, 95 id. 546, 553; *Stringham v. Stewart*, 100 id. 516.) A request to charge the jury should be in such form that the court may charge in the terms of the request without qualification. (*Carpenter v. Stilwell*, 11 N. Y. 61, 79.)

PARKER, J. We are of the opinion that the evidence did not warrant the court in submitting to the jury whether plaintiff's injury resulted from the negligence of the defendant. The plaintiff, while in discharge of his duty as an employe of defendant, was, without fault on his part, seriously injured by

Opinion of the Court, per PARKER, J.

the collision of the locomotive, upon which he was riding, with an unattended freight car. The accident took place on defendant's road, about a mile east of East Palmyra, on the 19th day of February, 1884. It appears that the defendant placed three freight cars on a side-track at Newark for loading at the warehouse of Perkins & Co. They were coupled together, and the brakes on the westerly and middle cars set. Perkins & Co., for their convenience in loading, moved the middle and easterly cars further east, leaving the westerly car standing where it was originally placed. Sometime during the night of the accident this car was moved off the side-track onto the main track, and thence to the point of collision. No one saw the car moved or could account for it, except on the theory that the car had been driven out upon and along the main track by an easterly wind, which the evidence demonstrated had blown with great velocity during the night. It is not questioned but that the station agent and other employes of defendant at Newark were competent and skillful. The trial court rightly held that the defendant had given to the station agent at Newark proper instructions as to the method of securing the cars while upon the side-track.

But one ground, therefore, remained to the plaintiff upon which to predicate defendant's negligence. Was the movement of the car made possible because of defendant's omission to supply it with a suitable brake? The plaintiff attempted to show that the brake was defective and, therefore, not effectual for the purpose of preventing the car from being moved by a strong wind. His proof in that direction consisted of the testimony of several witnesses to the effect that the brake-shoes had worn thin and were only half an inch thick; whereas new shoes are two inches thick. The examination made by them was after the car had been taken to East Rochester for repairs, and, as two of the defendant's witnesses testified without contradiction, after the truck and brake-shoes had been changed. A change necessitated by the breaking of the truck in the collision. But assuming that the brake-shoes described by plaintiff's witnesses were on the car in question at the time

Statement of case.

of the accident, the fact that they were only half an inch thick does not alone permit the finding in question. Whether they were worn or unworn is unimportant, if they still grasped the wheels effectively. The defendant was not bound to furnish new brake-shoes or those which had only been worn away a half an inch or an inch, but brake-shoes effectual for the purpose for which they were used. Its duty to an employe is not measured by the thickness of a brake-shoe, but by its adequacy for the use to which it is put.

It was, therefore, incumbent upon the plaintiff to prove facts permitting the inference that this brake could not be applied, or that when applied it was not as effective as it should have been or would have been with thicker brake-shoes. This he failed to do. Indeed, the only evidence upon the subject consists of the testimony of the brakeman who applied the brake for the purpose of stopping the cars when they were run upon the side-track, and that of two other employees of the defendant. The brakeman testified that it was a good brake and worked all right; and the others, that they saw him apply it.

We are thus forced to the conclusion that the burden resting upon the plaintiff of establishing that his injury resulted from the failure of the defendant to perform some duty owing to him has not been borne.

The judgment should be reversed.

All concur, except BRADLEY and HAIGHT, JJ., not sitting.

Judgment reversed.

DAVID H. CRANE, Respondent, v. MARTHA McDONALD,
Impleaded, etc., APPELLANT.

When a person, without collusion, is subjected to a double demand to pay an acknowledged debt, and it appears that, at least a fair doubt exists, either upon questions of fact or of law, as to the rights of the conflicting claimants, he may bring an action of interpleader against them.

It seems, the material allegations in a complaint in such an action are, that two or more persons have preferred a claim against the plaintiff; that

Statement of case.

they claim the same thing; that plaintiff has no beneficial interest in the thing claimed; and, that he cannot determine without hazard to himself to which of the defendants the thing belongs.

It seems, also, if it appears by the answers of the defendants, that each claims the fund or thing in dispute, no other evidence of that fact is required to entitle the plaintiff to a decree.

As to whether the old rule still exists in this state requiring the plaintiff in such an action to show a privity existing between the defendants, or whether it is sufficient to show independent conflicting claims, *quære*.

Plaintiff's complaint in such an action alleged, and the court found in substance, that there was due from him a sum specified upon a contract between him and G., that one of the defendants claimed said sum as assignee of G's interest in the contract, and had brought an action against him to recover the same; that the other defendant also claimed said sum as administrator of M., on the ground that he had an attorney's lien thereon; that he had obtained an attachment pursuant to which a levy had been made upon the debt and plaintiff had been forbidden to pay the same to any one except the sheriff; that plaintiff was willing and had offered to pay to either of the defendants upon being indemnified, but that both had refused to indemnify him. The court also found that plaintiff could not, without hazard, pay the sum due to either of the defendants, and that he was not in collusion with either of them. Before the action was commenced, plaintiff paid the money into court, pursuant to its order, to abide its decision as to who was entitled thereto. Both defendants by their answers claimed the fund. *Held*, that a judgment of interpleader and granting an injunction perpetually restraining further prosecution of the action against plaintiff was properly rendered.

(Argued February 24, 1890; decided March 11, 1890.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made July 1, 1886, which affirmed a judgment in favor of plaintiff, entered upon a decision of the court on trial at Special Term.

This was an action of interpleader.

The complaint alleged in substance and the trial court found that the following facts existed, when the action was commenced: The plaintiff held in his hands the sum of \$808 then due from him upon a contract that he had entered into with one Jennie L. Graves. At the same time the defendant, Martha McDonald, who is the mother of said Jennie L. Graves,

Statement of case.

claimed said sum as the assignee of the latter's interest in said contract and had brought an action against the plaintiff to recover the same. The defendant George E. Goodrich, as administrator, etc., of Milo Goodrich, deceased, also claimed said sum on the ground that he had an attorney's lien thereon and said defendant had obtained an attachment pursuant to which the sheriff of Cortland county had levied upon the claim in question and had forbidden the plaintiff to pay said money to Mrs. McDonald or to any one except himself. The plaintiff was ready to pay it into court to abide the event of any action between the defendants and was willing to pay it to either upon being indemnified and had so notified them, but both had refused to indemnify him. He could not, without hazard, pay the same to either and he was not in collusion with either, but in good faith desired that they should settle the matter between themselves.

Before this action was commenced plaintiff paid the amount involved into court, pursuant to an order made at Special Term, to abide its decision as to who was entitled thereto.

The court found, as a conclusion of law, that this was a proper case for an interpleader and for an injunction perpetually restraining Mrs. McDonald from the further prosecution of the action brought by her against the plaintiff.

Defendant McDonald alone appealed from the judgment of the Special Term.

Matthew Hale for Martha A. McDonald appellant. The court erred in denying the motion to dismiss the complaint. (*B. & O. R. R. Co. v. Arthur*, 90 N. Y. 234; *Story's Eq. Pl.* § 293; 3 *Pom. Eq. Juris.* §§ 1324, 1328; *Thurber v. Blanck*, 50 N. Y. 80; *Johnston v. Stimmel*, 89 id. 117, 121; *Castle v. Lewis*, 78 id. 131, 137; *Lynch v. Crary*, 52 id. 181, 183; *N. Bank v. Yandes*, 44 Hun, 55, 60, 63; *Code Civ. Pro.* § 699; *Tooker v. Arnour*, 76 N. Y. 397.) The court erred in holding that any case was made out for a bill of interpleader or for an injunction. (*Arnold v. Angell*, 62 N. Y. 508; *Day v. Town of New Lots*, 107 id. 148, 154; *Romeyn*

Statement of case.

483, 492; *Poor v. Guilford*, 10 id. 273; *Nelson v. Eaton*, 26 id. 410; *Wright v. Wright*, 70 id. 88.) The principles governing an action in the nature of a bill of interpleader, must not be confounded with the decisions under section 820 of the Code of Civil Procedure. (*Dreyfus v. Casey*, 52 Hun, 95; 44 id. 55.)

A. Pond and *W. B. French* for Martha A. McDonald, appellant. There is no evidence in the case of any claim or lien of the defendant, Goodrich, to or upon the bond and mortgage mentioned in the complaint. (112 N. Y. 162.) The judge erred in refusing to find as requested by the defendant, McDonald, that the plaintiff is, by virtue of his sealed contract with Mrs. Graves, her heirs and assigns, estopped from denying title of Mrs. McDonald to the bond and mortgage and contract in question, and the amounts due and to grow due thereon, and therefore has no authority to bring this interpleader suit. (Story's Eq. Pl. § 294; 3 Pom. Eq. Juris. § 1326; *Crawshaw v. Thornton*, 2 Myl. & Cr. 1; *B. & O. R. R. Co. v. Arthur*, 90 N. Y. 234, 238; *Marvin v. Ellwood*, 11 Paige 365; 4 Wait's Actions and Defenses, 153; *U. S. T. Co. v. Wiley*, 41 Barb. 477; *Lund v. S. Bank*, 37 id. 129; *Trigg v. Hitz*, 17 Abb. Pr. 436; *Delancy v. Murphy*, 24 Hun, 503; *Sherman v. Partridge*, 4 Duer, 646; *N. Bank v. Shillings*, 132 Mass. 410; *James v. Pritchard*, 7 Mees. & Wels. 215; *Slaney v. Sidney*, 14 id. 800.) The judge erred in refusing to find as requested by defendant, McDonald, that the plaintiff might and could have safely paid said claim of the defendant, McDonald, to the said \$808 to her without the hazard of exposing himself to the danger of being compelled to pay the same to the defendant, Goodrich. (*Flagg v. Munger*, 9 N. Y. 483, 492; *Poor v. Guilford*, 6 id. 273; *Nelson v. Eaton*, 26 N. Y. 410; *City Bank v. Perkins*, 29 id. 554; *B. & O. R. R. Co. v. Arthur*, 90 id. 234; *Wright v. Wright*, 70 id. 98.) The judge erred in refusing to non-suit, on the ground that the two claims of the defendants are not identical; and in refusing to find as requested, that the alleged claims of the

Statement of case.

defendants to the said sum of \$808 are not the same. (3 Pom. Eq. Juris. § 1323; 16 N. Y. 543.)

A. P. Smith for respondent. In this case the answers of both defendants claim the fund in dispute. In such case no proof was required upon the trial. (*Balchen v. Crawford*, 1 Sand. Ch. 380.) These facts are all set forth in the complaint; admitted by the answers taken together; fully sustained by the proof, and found by the court, and contain all the essentials of a strict interpleader. (Story's Eq. Juris., § 808; *Richards v. Salter*, 6 John. Ch. 445; *Dorn v. Fox*, 61 N. Y. 264; *B. & O. R. R. Co. v. Arthur*, 10 Abb. [N. C.] 147; *Johnston v. Leurs*, 4 Abb. [N. S.] 150; *Ins. Co. v. Killer*, 7 Civ. Pr. Rep. 109.) There is nothing in defendant's point that there is no privity between these defendants. Their title is derivative. (3 Pom. Eq. Juris. § 1327; Story's Eq. Juris. §§ 817, 824; *Parks v. Jackson*, 11 Wend. 442.) The complaint is sufficient and sets forth the claims of both defendants so fully that they can be understood by any person of ordinary capacity and understanding. But if this were otherwise, the remedy of the defendants was by motion to make the complaint more definite and certain. (*B. & O. R. R. Co. v. Arthur*, 10 Abb. [N. C.] 147; 3 Pom. Eq. Juris. § 1328; *Reider v. Sayre* 70 N. Y. 180; *Hudson v. Swan*, 7 Abb. [N. C.] 324.) To justify the interpleader it is sufficient for the plaintiff to show that he holds a certain fund to which he makes no claim, and that it is claimed by both defendants and the nature of their claims as made to him, and that he is ready to pay it over to whoever is shown entitled to it. This was shown by the complaint in this case and not denied by the answers. (*Van Buskirk v. Roy*, 8 How. Pr. 425; *Fletcher v. T. S. Bank*, 14 id. 383; 1 Wait's Pr. 167; *Bleeker v. Graham*, 21 Edw. Ch. 647; *Atkinson v. Monks*, 1 Cow. 691; *Yates v. Tisdale*, 3 Edw. Ch. 71; *Duke of Bolton v. Williams*, 2 Ves. Jr. 138, 152; *E. I. Co. v. Edwards*, 18 Ves. 376; *Regan v. Serle*, 9 Dowl. 193; *Ins. Co. v. Killer*, 7 N. Y., Civ Pro. Rep. 109; *Barnes v. Mayor, etc.*,

Opinion of the Court, per VANN, J.

27 Hun, 236; *Board of Suprs. v. Deyoe*, 77 N. Y. 219; *N. Y. & N. H. R. R. Co. v. Schuyler*, 17 id. 608; *Badeau v. Rogers*, 2 Paige, 209; *Bedell v. Hoffman*, Id. 199; *Johnston v. Stimmel*, 89 N. Y. 117.) The remedies by action of interpleader and by motion under the Code are concurrent. (1 Wait's Pr. 166, 174; *McKay v. Draper*, 27 N. Y. 256, 260; *Patterson v. Perry*, 14 How. Pr. 505; 6 Duer, 686; *Beck v. Stephani*, 9 How. Pr. 193; *Vosburgh v. Huntington*, 15 Abb. Pr. 254; *Sherman v. Partridge*, 1 id. 256; 11 How. Pr. 154.)

VANN, J. The material allegations in a bill of interpleader, according to an early decision by the Court of Errors, are: (1) That two or more persons have preferred a claim against the complainant; (2) that they claim the same thing; (3) that the complainant has no beneficial interest in the thing claimed; and (4) that he cannot determine, without hazard to himself, to which of the defendants the thing belongs. (*Atkinson v. Manks*, 1 Cow. 691, 703.) It was also held in that case that the complainant should annex to his bill an affidavit that there is no collusion between him and any of the parties and that he should bring the money or thing claimed into court so that he could not be benefited by the delay of payment which might result from the filing of his bill. This method of procedure, in substance, still prevails. (*Dorn v. Fox*, 61 N. Y. 268.) The plaintiff insists that he has conformed to the practice thus laid down in every particular, while the appellant contends that the complaint is not sufficiently specific with reference to the claims of the defendants, and that no privity is shown between them in relation to their respective demands.

The complaint describes the claim of the defendant McDonald more fully than that of the defendant Goodrich, because the former had sued him and had thus furnished him with a definite description. While the claim of the latter was not clearly nor fully described, enough was set forth to show that it was not a mere pretext, but that it apparently rested upon a reasonable and substantial foundation. If the appellant desired that it should be made more definite and certain, his remedy

Opinion of the Court, per VANN, J.

was by motion under section 546 of the Code of Civil Procedure. (*Nefitel v. Lighthstone*, 77 N. Y. 96.) Upon the trial, according to the old chancery practice, as it appeared by the answers of the defendants that each claimed the fund in dispute, no other evidence of that fact was required to entitle the plaintiff to a decree. (*Bulchan v. Crawford*, 1 Sandf. Ch. 380.)

In this case, however, the point was not left to be determined by the pleadings, but evidence was introduced upon the subject and it appeared that at least a fair doubt existed as to the rights of the conflicting claimants. It was not necessary for the plaintiff to decide, at his peril, either close questions of fact or nice questions of law, but it was sufficient if there was a reasonable doubt as to which claimant the debt belonged. When a person, without collusion, is subjected to a double demand to pay an acknowledged debt, it is the object of a bill of interpleader to relieve him of the risk of deciding who is entitled to the money. If the doubt rests upon a question of fact that is at all serious it is obvious that the debtor cannot safely decide it for himself, because it might be decided the other way upon an actual trial, while if it rests upon a question of law, as was said in *Dorn v. Fox* (61 N. Y. 270), "so long as a principle is still under discussion * * * it would seem fair to hold that there was sufficient doubt and hazard to justify the protection which is afforded by the beneficent action of interpleader." Although the claim of Mr. Goodrich has since been held untenable by this court (*Goodrich v. McDonald*, 112 N. Y. 157), it does not follow that no doubt existed when this action was commenced, because the Supreme Court, both at Special and General Term, held that it was valid and attempted to enforce it. This conflict in the decisions of the courts show that the adverse claims of the defendants involved a difficult and doubtful question and is a conclusive answer to the contention of the appellant that the plaintiff did not need the aid of an action of this character. Was it possible for him to safely decide a point so intricate as to cause those learned in the law to differ so widely?

Opinion of the Court, per VANN, J.

The law did not place so great a responsibility upon him, but provided him with a remedy to protect himself against the double liability, or, to speak more accurately, against a double vexation on account of one liability. (*Dorn v. Fox, supra*; *Caulkins v. Bolton*, 31 Hun, 458; 98 N. Y. 511; *Johnston v. Stimmel*, 89 N. Y. 117; *Schuyler v. Pettisser*, 3 Edw. Ch. 191; *Bedell v. Hoffman*, 2 Paige 199; *M. & H. R. R. Co. v. Clute*, 4 Paige 384; *Bell v. Hunter*, 3 Barb. Ch. 391; *Badeau v. Tyler*, 1 Sandf. Ch. 270; *German Ex. Bank v. Commr's of Excise*, 6 Abb. [N. C.] 394; *B. & M. R. R. Co. v. Arthur*, 10 id. 147; *Pomeroy Eq. Jur.* §§ 1320-1327; *Story Eq. Jur.* §§ 800-824.)

It required, however, that he should act in good faith, and he insists that he furnished ample evidence upon that question. He offered to pay the money to Mrs. McDonald if she would indemnify him against the claim of Mr. Goodrich, but she refused to do so, and commenced an action to recover the amount involved. A like offer to Mr. Goodrich upon the condition that he should furnish indemnity was declined, and legal proceedings were threatened. Neither defendant would recede from the position thus taken, but both persisted in their respective demands. The plaintiff thereupon paid the money into court pursuant to its order, and then commenced this suit annexing to his complaint, in addition to the usual verification, an affidavit stating that the action was brought in good faith and without collusion with either defendant or with any person "in their behalf." It did not appear that he had attempted to favor the position of either claimant. These facts, with others appearing in the record, furnished adequate support to the conclusion of the trial judge that the plaintiff acted in good faith.

The appellant contends that no such privity was shown to exist between the defendants as to authorize the plaintiff to bring an action to cause them to interplead.

While the early authorities were exacting upon this subject, many of the later cases have been less rigid, and some have ignored it altogether. The doctrine seems to have been abro-

Opinion of the Court, per VANN, J.

gated in England, partly by statute and partly by judicial decisions. Mr. Pomeroy, referring to the rule, says that "it is a manifest imperfection of the equity jurisdiction that it should be so limited. A person may be and is exposed to danger, vexation and loss from conflicting independent claims to the same thing, as well as from claims that are dependent, and there is certainly nothing in the nature of the remedy which need prevent it from being extended to both classes of demands." (Pomeroy Eq. Jur. § 1324, note.)

Our statutory interpleader by order apparently does not recognize the doctrine. (Code Civ. Pro. § 820.) A somewhat similar statute in England led the courts of that country to declare that they no longer felt bound, even in an equity action, by the narrow principle previously laid down. (*Attenborough v. London, etc., Dock Co.*, L. R. [3 C. P. Div.] 450.) It is not necessary, however, for us to decide whether the rule still exists, or to what extent it exists in this state, because, according to the most exacting authorities, where the adverse titles of the claimants are both derived from a common source, it is sufficient to authorize an interpleader. Such is the case under consideration. Mrs. Graves, as the owner of the contract in question and of the money that was invested therein, was the common source of title to both defendants. The title of Mrs. McDonald, as claimed, for it is the claim only that is here material, was by assignment of the legal title from Mrs. Graves, while the claim of Mr. Goodrich was by an equitable assignment from the same person. Each defendant, acknowledging the original title of Mrs. Graves, claimed the same debt under her, and the title of each was, therefore, derivative, as that word is used with reference to this subject. (Pomeroy Eq. Jur. § 1327.)

The plaintiff held the money to discharge the debt substantially as a stakeholder, having no beneficial interest therein and being under no independent liability to either claimant. He does not deny the title of Mrs. Graves, but, affirming it, places himself upon the uncertainty as to which of the two persons claiming from her is entitled to receive the fund.

Opinion of the Court, per VANN, J.

Whether the claim of Mr. Goodrich was based on a lien by contract, or a lien by attachment, or both, it originated with Mrs. Graves, who at one time owned all that was claimed by either defendant. His lien had been sanctioned by a decree of the Supreme Court nearly a year before the trial of this action, and, although that judgment was subsequently reversed, it was still in force when the judgment now under review was rendered.

The lien of the attachment, as it was claimed to exist, arose after the covenant to pay the sum in question was entered into by the plaintiff, and, although that lien also was subsequently held invalid, it was sufficient to support an action of interpleader and is a complete answer to the contention of the appellant that this suit was not regularly brought, owing to the contractual relation between herself and the plaintiff.

If the actual truth were a defense to a bill of interpleader, the argument of the appellant would be conclusive, but necessarily the plaintiff in such an action has the right to rely upon what is claimed to be true, as otherwise the remedy would be of no value.

After carefully examining all of the exceptions involving questions of law, we think that none of them were well taken, and that the judgment appealed from should be affirmed with costs.

All concur, except FOLLETT, Ch. J., not sitting.

Judgment affirmed.

MEMORANDA

OF THE

*CAUSES DECIDED DURING THE PERIOD EMBRACED IN THIS
VOLUME, WHICH ARE NOT REPORTED IN FULL.*

JOHN FLYNN et al., as Commissioners of Highways, etc.,
Respondents, *v.* DAVID WHIPPLE, as Commissioner of
Highways, etc., Appellant.

THIS case presented the same questions and was argued and
decided with *Flynn v. Hurd* (*ante* p. 19).

GEORGE L. WILTSIE, as Surviving Partner, etc., Respondent,
v. THE VILLAGE OF GREENBUSH, Appellant.

(Argued November 25, 1889 ; decided December 10, 1889.)

APPEAL from judgment of the General Term of the
Supreme Court in the third judicial department, entered upon
an order made December 1, 1886, which affirmed a judgment
in favor of plaintiff, entered upon the report of a referee.

R. E. Andrews and *Levi F. Longley* for appellant.

Esek Cowen for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

ZACHEUS W. BARRETT, Appellant, v. THE STATE OF NEW YORK, Respondent.

(Argued November 25, 1889; decided December 10, 1889.)

APPEAL from order of the board of claims, made September 26, 1884, which affirmed an award made by the canal appraisers.

John A. Barhite for appellant.

John W. Hogan for respondent.

Agree to affirm; no opinion.

All concur.

Order affirmed.

WILLIAM W. NUGGINS et. al., Appellants, v. THE STATE OF NEW YORK, Respondent.

Argued and decided with *Barrett v. The State (supra)*.

MORRIS SPIEGEL, Respondent, v. ISAAC HAYS, Impleaded, etc., Appellant.

For the purpose of discrediting a witness who has given material testimony in favor of the party calling him, the opposite side may, on cross-examination, show that the witness has been convicted of a crime, and of what crime, and the witness may be compelled to answer. (Penal Code, § 714.)

(Submitted November 26, 1889; decided December 10, 1889.)

APPEAL from judgment of the General Term of the City Court of Brooklyn entered upon an order made December 31, 1886, which affirmed a judgment in favor of plaintiff entered upon a verdict.

This was an action of replevin.

Plaintiff claimed title to the property from one Samuels. Defendants taking under an attachment against the sale to plaintiff was fraudulent and the vendor.

It appeared that the consideration was the payment and cancellation of a debt to him of \$1,000, and the payment of \$372, and plaintiff's evidence was that the purchase in good faith; that he knew that Samuels owed anyone else, and had possession; also, that the amount was about the value of the goods.

The court here held that the question was fairly presented to the jury and that the good faith of the transaction was a question for the jury.

A witness called by defendants, and his testimony against plaintiff, was asked, "after he had admitted he had been convicted of a crime, were you convicted of?" This was a question, having appealed to the court, and the answer which he did, showing that it was a crime.

The court here say in reference to section 714, Penal Code, permits that in the examination of the witness that he was not a crime, without the production of the evidence, the question is simply whether a confession of a crime may be shown for the purpose of impeaching the evidence.

That the jury may and should give weight to evidence showing that the defendant is guilty of a crime is beyond question. (*Real v. People*, 280; *People v. Noelke*, 94 id. 137; *People v. Ryan*, 541; *Ryan v. People*, 79 id. 598.)

The apparent conflict in some of the cases as to the mode of discrediting witnesses has been resolved by proving the discrediting fact.

It had been held before the Penal Code, that it is not competent to show by a cross-examination of the witness himself that he had been convicted of a crime, if the objection was made that the record of the conviction is the best evidence. (*Newcomb v. Griswold*, 24 N. Y. 298; *Real v. People*, 42 id. 280.) Such objection being no longer available, you may show upon the cross-examination of the witness himself, that he has been convicted of a crime, or that he had been imprisoned upon the conviction of a crime or that he had committed a crime. (*People v. Irving*, 95 N. Y. 541; *People v. Noelke*, 94 id. 137-144; *Real v. People*, 42 id. 280.)

The courts have repeatedly held that it does not prove that a witness *has been guilty of a crime*, to prove he has been arrested upon the charge of a crime or that he has been indicted for a crime. (*People v. Crapo*, 76 N. Y. 288; *People v. Brown*, 72 id. 571; *People v. Irving*, 95 id. 544; *Smith v. Mulford*, 42 Hun, 347.)"

Blumenstiel & Hirsch for appellant.

Jerry A. Wernberg for respondent.

POTTER, J., reads for affirmance.

All concur.

Judgment affirmed.

JACOB RUBINO, Appellant, v. WILLIAM L. SCOTT, Respondent.

Where, in an action to recover an alleged agreed compensation for services, the fact of the agreement is in issue, evidence on the part of defendant of the value of such services is competent as bearing upon the issue.

(Argued November 26, 1889; decided December 10, 1889.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made March 11, 1886, which affirmed a judgment in favor of defendant, entered upon a decision of the court on trial without a jury.

This action was brought upon an alleged contract of employ-

ment of plaintiff by defendant to assist him in purchasing certain railroad bonds for an agreed compensation. The making of the agreement and the rendition of the services were put in issue, and the trial court found, upon evidence deemed by this court sufficient, that defendant neither agreed to or did employ the plaintiff in the matter referred to, and never agreed to pay him anything on that account.

Defendant was allowed to prove, under objection and exception, the usual rates of commission in the city of New York, where the agreement was alleged to have been made, for buying and selling railroad bonds. The court say, "in *Weidner v. Phillips* (114 N. Y. 458), it was held that when the fact of an agreement for the sale of property for a specific price is in dispute upon the trial, evidence of its value may be given as bearing upon the question. There is no reason why the same rule may not be applicable to that arising out of the disputed fact whether the defendant, by agreement, undertook to allow and pay to the plaintiff the amount of commissions, etc., for services as claimed by him. In that view the exceptions were not well taken."

Joseph M. Deuel for appellant.

Thomas G. Shearman for respondent.

BRADLEY, J., reads for affirmance.

All concur.

Judgment affirmed.

MARIA FREDERICKS, Respondent, v. ALEXANDER V. DAVIDSON,
Sheriff, etc., Appellant.

(Argued December 2, 1889; decided December 17, 1889.)

APPEAL from order of the General Term of the Superior Court of the city of New York, made June 8, 1886, which reversed a judgment in favor of defendant entered upon a verdict and ordered a new trial.

Wales F. Severance for appellant.

Francis B. Chedsey for respondent.

Agree to affirm; no opinion.

All concur.

Order affirmed and judgment absolute for the respondent on stipulation.

PETER HARTWIG, Respondent, v. BAY STATE SHOE AND
LEATHER COMPANY, Appellant.

(Argued December 2, 1889; decided December 20, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made February 18, 1887, which affirmed a judgment in favor of the plaintiff entered upon a verdict, and affirmed an order denying a motion for a new trial.

This action was brought to recover damages for injuries received by plaintiff while using one of defendant's machines, which he claimed was defective.

The following is the *mem.* of decision.

"The plaintiff was negligent in attempting to adjust the mold while the press was in motion, and also in putting the finger which was injured on the top of the mold instead of its side when attempting to adjust it. Each of these acts contributed to the injury, and the trial court erred in refusing the defendant's motion for a non-suit.

The judgment should be reversed and a new trial granted, with costs to abide the event."

W. C. Beecher for appellant.

Charles J. Patterson for respondent.

FOLLETT, Ch. J., reads for reversal.

All concur except BROWN, J., not sitting; and BRADLEY and HAIGHT, JJ., not voting.

Judgment reversed.

JAMES A. DEERING, Appellant, v. SAR

(Argued December 4, 1889; decided Dece

APPEAL from judgment of the Gen Court of the city of New York, entered December 31, 1886, which affirmed defendant, entered upon an order dis trial.

This action was brought to recover between plaintiff and the German Sa to be paid the former for his service of an assessment upon certain m latter, which sum plaintiff claimed agreed to pay.

Subsequent to the agreement the sell the premises to one Wood, it was said in said contract as to the and the only reference to assessment was to be conveyed "subject to hereafter liens upon the premises." performance of the contract of sale, the property was conveyed to defend ments now liens upon said premis delivering of the deed, which was it was informed of the contract between and agreed to assume the same, Wo to prove he was acting as agent for that when he made the contract his purchase-price out of funds in his po wife, but upon her refusal to become agreed to accept a deed and perform and gave him the money for that pu authority from defendant to assume t of the bank with plaintiff, and denied ment to assume the same. An order was made in 1882. *Held*, that the bu show affirmatively Wood's authority:

SICKELS—VOL. LXXIII. 84

the contract with plaintiff, and as this was not shown that the complaint was properly dismissed ; that the authority to take the deed for her, gave him no power to add to the consideration expressed in the contract, or to attach any new condition to the delivery of the deed.

Nathaniel C. Moak for appellant.

Albert Mathews for respondent.

BROWN, J., reads for affirmance.

All concur.

Judgment affirmed.

ADELE E. MATTHEISSEN as Executor, et al., etc., Respondents,
v. MARY E. STAFFORD, Appellant.

(Submitted December 4, 1889; decided December 20, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made February 15, 1887, which directed judgment in favor of plaintiff on an agreed case submitted under the Code of Civil Procedure, section 1279.

A. W. Gleason for appellant.

Wm. C. De Witt for respondents.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

NELSON S. BUTTON, Respondent, v. RATHBONE, SARD & Co.,
Appellant.

In an action for the alleged conversion of certain goods plaintiff claimed under a chattel mortgage from T., the former owner. Defendant took possession under a subsequent bill of sale from T., the stipulated pur-

chase-price having, in pursuance of the contract of sale, been credited upon an indebtedness of T. Plaintiff's mortgage had not, at the time, been filed, and defendant had no knowledge or notice thereof. Defendant offered to prove that the mortgage was fraudulent, which, on objection, was excluded. *Held*, error.

(Argued December 2, 1889; decided December 20, 1889.)

APPEAL from judgment of the Supreme Court in the fifth judicial department, which affirmed a judgment in favor of plaintiff, entered upon a verdict directed by the court.

This action was brought to recover the value of certain personal property alleged to belong to plaintiff, and to have been converted by defendant. The property formerly belonged to one Tully. Plaintiff claimed title under a chattel mortgage executed by Tully. Defendant claimed under a subsequent bill of sale executed by Tully, under which it took possession of the property. The purchase-price it was agreed was to be and was credited on an indebtedness of Tully to defendant. Plaintiff's mortgage was not then filed, and defendant had no knowledge or notice of it. On the trial defendant offered to show that the chattel mortgage was fraudulent and void, which was objected to and excluded. The majority of the court, while not concurring in the opinion, concur in the result upon the following ground: "The defendant having acquired title to and possession of the chattel involved, without notice or knowledge of plaintiff's unfilled chattel mortgage, was in a position to challenge its validity. The court erred in refusing to permit the defendant to show the mortgage was fraudulent, for which error the judgment should be reversed and a new trial granted."

G. L. Stedman for appellant.

Horace McGuire for respondent.

POTTER, J., reads for reversal and new trial.

All concur in result, except BRADLEY and HAIGHT, J.J., not sitting.

Judgment reversed.

S. TOWNSEND PECKHAM, Appellant, v. THE MANHATTAN LIFE
INSURANCE COMPANY, Impleaded, etc., Respondent.

(Submitted December 5, 1889; decided December 20, 1889.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, entered upon an order made June 9, 1885, which affirmed a judgment sustaining a demurrer to plaintiff's complaint, entered upon an order of Special Term.

John W. Boyle for appellant.

James Otis Hoyt for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

WILLIAM W. ROPE et. al., Respondents, v. EVA HESS,
Impleaded, etc., Appellant.

(Argued December 5, 1889; decided December 20, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made February 15, 1887, which affirmed a judgment in favor of plaintiffs entered upon the report of a referee.

This action was brought to enforce certain alleged mechanics' liens on premises owned by defendant Eva Hess. It appears that before the filing of the liens the appellant paid the contractor who had erected a house upon her premises in full for the work. The respondents claimed, and gave evidence tending to show, that the husband of the appellant acted as her agent in all matters regarding the work, and proved conversations with him tending, as they claimed, to show that the last payment was made in violation of an express promise on

his part, in bad faith, by collusion and in violation of the rights of the lienors. The appellant denied the agency of her husband, and called him as a witness, and by proper and appropriate questions sought to elicit testimony in support of her contention. These were objected to, and objection sustained. *Held*, error.

George H. Yeomans for appellant.

F. P. Bellamy for respondent Rope.

W. S. Packer for respondents King and Adama.

I. N. Sievioright for respondent MacDonald.

J. N. Beattie for respondent Haas.

George C. Case for respondent Self.

PARKER, J., reads for reversal.

All concur.

Judgment reversed.

JAMES G. PATTON, Respondent, *v.* DANIEL A. BULLARD et al.,
Appellants.

(Argued December 5, 1889; decided December 20, 1890.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made December 1, 1886, which affirmed a judgment in favor of plaintiff, entered upon a decision of the court on trial without a jury.

E. F. Bullard for appellants.

Charles E. Patterson for respondent.

Agree to affirm on opinion of court below.

All concur.

Judgment affirmed.

LEONARD G. QUINLIN et al., Respondents, *v.* AARON RAYMOND,
Appellant.

(Submitted December 6, 1889; decided December 20, 1889.)

APPEAL from judgment of the General Term of the Court of Common Pleas for the city and county of New York, entered upon an order made December 6, 1886, which affirmed a judgment in favor of plaintiffs, entered upon the report of a referee.

Ira D. Warren for appellant.

Henry A. Root for respondents.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

ROBERT L. CARPENTER, Appellant, *v.* ORVILLE O. JONES et al.
Respondents.

(Submitted December 6, 1889; decided December 20, 1889.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made December 14, 1886, which affirmed a judgment in favor of defendants, entered upon a decision of the court on trial at Special Term.

Phillips & Avery for appellant.

Randolph H. Cole for respondents.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

ABRAM V. MORRIS, Respondent, *v.* FRANCIS A. FALES et al.,
Appellants.

(Argued December 10, 1889; decided January 14, 1890.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon



favor of defendant directed by the court at the circuit and affirmed an order denying a motion for a new trial.

Barnwell Rhett Heyward for appellant.

Hamilton Harris for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

IRVING WRIGHT, Respondent, *v.* HARRIET E. ROBERTS, et al.,
Appellants, et al., Respondents.

(Argued December 17, 1889; decided January 14, 1890.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made February 15, 1887, which affirmed a judgment in favor of plaintiff entered upon a decision of the court on trial without a jury.

Charles Henry Phelps for appellants.

J. S. Millard and *L. T. Yale* for respondents.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

WEBSTER GILLET, Respondent, *v.* FRANCIS M. GILLET et al.,
Appellants.

(Argued December 17, 1889; decided January 14, 1890.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York entered upon an order made March 15, 1887, which affirmed a judgment in favor of plain-

tiff, entered upon a verdict, and affirmed an order denying a motion for a new trial.

Ira D. Warren for appellants.

Wm. M. Safford for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

SARAH J. HAMILL, Respondent, *v.* LEWIS ROBERTS et al.,
Appellants, et al. Respondents.

(Argued December 17, 1889; decided January 14, 1890.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made February 15, 1887, which affirmed a judgment in favor of plaintiff, entered upon a decision of the court on trial at Special Term.

Charles Henry Phelps for appellants.

J. S. Millard and *L. T. Yale* for respondents.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

CLARA PHILLIPS, Respondent, *v.* THE TOWN OF FISHKILL,
Appellant.

(Argued December 18, 1889; decided January 14, 1890.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made March 3, 1887, which affirmed a judgment in

favor of plaintiff entered upon a verdict, and affirmed an order denying a motion for a new trial.

A. S. Hutchins for appellant.

S. K. Phillips for respondent.

Agree to affirm; no opinion.

All concur except PARKER, J., not voting.

Judgment affirmed.

ALTHEA HERR, Respondent, *v.* THE ROME, WATERTOWN AND
OGDENSBURG RAILROAD COMPANY, Appellant.

(Submitted December 18, 1889; decided January 14, 1890.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made January 11, 1887, which affirmed a judgment in favor of plaintiff, entered upon a verdict, and affirmed an order denying a motion for a new trial.

Edmund B. Wynn for appellant.

W. F. Porter for respondent.

Agree to affirm; no opinion.

All concur except FOLLETT, Ch. J., not sitting, and HAIGHT, J., not voting.

Judgment affirmed.

EDWARD VAN ORDEN, Respondent, *v.* WILLIAM D. ANDREWS
et al. Appellants.

(Argued December 19, 1889; decided January 14, 1890.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made May 13, 1887, which affirmed a judgment in favor of

plaintiff, entered upon a verdict, and affirmed an order denying a motion for a new trial.

Jesse Johnson for appellants.

W. T. B. Milliken for respondent.

Agree to affirm ; no opinion.

All concur, except HAIGHT, J., not sitting.

Judgment affirmed.

EMILY J. SMITH, Respondent, v. JEREMIAH B. ROGERS,
Appellant.

(Submitted December 20, 1889; decided January 14, 1890.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made at the September term, 1886, which affirmed a judgment in favor of the plaintiff, entered upon the report of a referee.

Chester M. Elliott for appellant.

A. L. Johnson for respondent.

Agree to affirm ; no opinion.

All concur, except BRADLEY and HAIGHT, J.J., not sitting.

Judgment affirmed.

WILLIAM MOORES, Appellant, v. JOHN TOWNSHEND et al.,
Respondents.

(Argued January 15, 1890; decided January 21, 1890.)

MOTION to dismiss appeal from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made February 14, 1887, which ordered judgment for defendants, upon a verdict directed by the court.

L. A. Gould for appellant.

John Townshend for respondents.

Agree to dismiss appeal, unless the appellant within ninety days procures a concise statement of the facts and of the question of law arising thereon, and of the determination of these questions by the General Term, to be prepared and settled and annexed to the judgment-roll, and a certified copy thereof transmitted to the clerk of the Court of Appeals, pursuant to the provisions of section 1339 of the Code of Civil Procedure, and pay fifty dollars costs.

All concur.

Ordered accordingly.

JAMES K. SELLECK, Appellant, *v.* WILLIAM H. KEELER, as Sheriff, etc., Respondent.

(Argued January 13, 1890 ; decided January 28, 1890.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made May 4, 1886, which affirmed a judgment in favor of defendant, entered upon a verdict.

Edward J. Meegan for appellant.

E. Countryman for respondent.

Agree to affirm ; no opinion.

All concur, except PARKER, J., not sitting.

Judgment affirmed.

MARGARET MURPHY, Appellant, *v.* LEWIS P. ROSS, Respondent.

(Submitted January 13, 1890 ; decided January 28, 1890.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made February 11, 1887, which affirmed a judgment in favor of defendant, entered upon the report of a referee.

George D. Forsyth for appellant.

David Hays for respondent.

Agree to affirm ; no opinion.
All concur, except BRADLEY and
Judgment affirmed.

FRANCIS C. HILL et al., Respondents
et al., Appellants

(Argued January 13, 1890 ; decided January 14, 1890)

APPEAL from judgment of the
Supreme Court in the second judicial
upon an order made May 21, 1887, was
in favor of plaintiffs, entered upon a
order denying a motion for a new trial.

John V. B. Lewis, for appellants.

Thomas Young, for respondents.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

WILCOX AND GIBBS SEWING MACHINE
THE KRUSE AND MURPHY MANUFACTURING
Respondents.

(Argued January 14, 1890 ; decided January 15, 1890)

APPEAL from judgment of the Court
and for the city and county of New York
order made January 6, 1887, which had
modified a judgment in favor of defendants.
decision of the court on trial at Special Term.

Stephen A. Walker for appellant.

J. Hampden Dougherty for respondents.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

**JAMES A. ROBINSON, Respondent, v. THE BROADWAY AND
SEVENTH AVENUE RAILROAD COMPANY, Appellant.**

(Argued January 14, 1890; decided January 28, 1890.)

APPEAL from judgment of the General Term of the Court of Common Pleas in and for the city and county of New York, entered upon an order made May 9, 1887, which affirmed a judgment in favor of plaintiff, entered upon a verdict.

Samuel B. Clarke for appellant.

James M. Hunt for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

**THOMAS DOYLE, Appellant, v. THE RECTOR, WARDENS AND
VESTRYMEN OF TRINITY CHURCH CORPORATION IN THE CITY
OF NEW YORK, Respondents.**

(Argued January 14, 1890; decided January 28, 1890.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made May 9, 1887, which affirmed a judgment in favor of defendants, entered upon a verdict directed by the court.

This action was brought to recover for services in sinking an artesian well for defendants. The main question involved was whether defendants were liable to pay for certain damages caused by an explosion in the well before its completion. The memorandum of decision is as follows :

“It was error to permit Mr. Cruger to testify that some one told him that one of the torpedoes was exploded just below the surface of the rock and so injured the well. The fact, if relevant, as it was deemed to be, to the question whether exploding the torpedo at this point was a negligent act, should have been proved by competent evidence or not at all.

"It was error to rule, as a question of law, that Foth acted, and was actually or apparently authorized to act, as the agent of Button in employing Seagul to explode the torpedoes, which question should have been submitted to the jury as one of fact. fact.

"For these errors the judgment should be reversed and a new trial granted, with costs to abide the event."

L. A. Fuller for appellant.

Charles L. Jones for respondents.

FOLLETT, Ch. J., reads *mem.* for reversal and new trial.

All concur.

Judgment reversed.

WILLIAM MOORES, Respondent, *v.* JOHN TOWNSHEND, Impleaded,
etc., Appellant.

(Argued January 15, 1890; decided January 28, 1890.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department made May 16, 1887, which reversed an order of Special Term, granting an extra allowance and modifying a judgment in favor of defendant in the above entitled action accordingly.

John Townshend appellant in person.

L. A. Gould for respondent.

Agree to affirm; no opinion.

All concur.

Order affirmed.

NANCY H. WILLIAMS, Respondent, *v.* GEORGE W. G. KINNEY
et al., Appellants.

(Argued January 18, 1890; decided January 31, 1890.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order

made January 21, 1887, which affirmed a judgment in favor of plaintiff, entered upon the report of a referee.

James P. Olney for appellants.

C. W. White for respondent.

Agree to affirm; no opinion.

All concur except FOLLETT, Ch. J., not sitting.

Judgment affirmed.

JAMES R. PHILLIPS, Respondent, *v.* CHARLES B. ROUSS
Appellant.

(Submitted January 14, 1890; decided January 31, 1890.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made March 31, 1887, which affirmed a judgment in favor of plaintiff, entered upon an order confirming an award of arbitrators, and affirmed an order denying a motion for a new trial.

Max Altmeyer for appellant.

Newcombe & Cardozo for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

HENRY WOLLREICH, Appellant, *v.* JOHN D. HEINS,
Respondent.

(Argued January 15, 1890; decided January 31, 1890.)

APPEAL from judgment of the General Term of the Court of Common Pleas in and for the city and county of New York, entered upon an order made May 19, 1887, which

affirmed a judgment in favor of defendant, entered upon the report of a referee.

Julius H. Seymour for appellant.

Alex. Thain for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

LORENZO J. BOVEE et al., Respondents, v. ROBERT C. LOWRY,
Impleaded, etc., Appellant.

(Argued January 15, 1890; decided January 31, 1890.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made the first Tuesday of January, 1887, which affirmed a judgment in favor of plaintiffs, entered upon the report of a referee.

John S. Davenport for appellant.

William C. Watson for respondents.

Agree to affirm; no opinion.

All concur except BRADLEY and HAIGHT, JJ., not sitting.

Judgment affirmed.

ELIZA C. NORTHRUP, Respondent, v. THE AMERICAN EXCHANGE
NATIONAL BANK, Appellant.

(Argued January 16, 1890; decided January 31, 1890.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made April 30, 1887, which affirmed a judgment in favor of plaintiff, entered upon a decision of the court on trial without a jury.

L. B. Bunnell for appellant.

John C. McCartin for respondent.

Agree to affirm; no opinion.

All concur, except FOLLETT, Ch. J., and VANN, J., not sitting.

Judgment affirmed.

JOHN B. HOWELL, Appellant, *v.* ANNA H. MANWARING, as
Executrix, etc., et al., Respondents.

(Argued January 17, 1890; decided January 31, 1890.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made October 22, 1886, which affirmed a judgment in favor of defendants, entered upon a decision of the court on trial at Special Term.

Horace L. Bennett for appellant.

Wm. S. Oliver and *J. B. Perkins* for respondents.

Agree to affirm; no opinion.

All concur, except BRADLEY and HAIGHT, JJ., not sitting.

Judgment affirmed.

CHARLES NORTHROP, Respondent, *v.* ALFRED H. SMITH,
Impleaded, etc., Appellant.

(Argued January 17, 1890; decided January 31, 1890.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made June 23, 1887, which affirmed a judgment in favor of plaintiff, entered upon a verdict, and affirmed an order denying a motion for a new trial.

This action was brought to recover the value of two regis-

tered United States bonds of \$5,000 each, alleged to have been loaned to the firm of Smith, Clark & Co., of which defendants were alleged to have been partners. Defendant Smith alone answered.

The evidence on the part of defendant tended to show that more than six years before the action was commenced plaintiff demanded certain bonds, including at least one for \$5,000, of Clark. Defendant's counsel requested the court to charge the jury that if they believed plaintiff had demanded the bonds of Clark more than six years before the commencement of the action plaintiff could not recover. This was refused. *Held*, error; and that the error required a reversal, as the fact, if found made the Statute of Limitations an absolute defense. (Code Civ. Pro., §§ 382, 410, 414.) The court say:

"A demand of one partner, while the firm was still in existence, was equivalent to a demand upon all." (*Hubbard v. Matthews*, 54 N. Y. 43, 50; *Baird v. Walker*, 12 Barb. 298; *Ball v. Larkin*, 3 E. D. Smith, 555; Abb. Trial Ev. 219; Am. and Eng. Ency. of Law, 528e.)"

Charles M. Earle for appellant.

James D. Fessenden for respondent.

VANN, J., reads for reversal and new trial.

All concur.

Judgment reversed.

JAMES E. HELLER et al., Respondents, v. THE ALLENTOWN MANUFACTURING COMPANY, Appellant.

(Submitted January 17, 1890; decided January 31, 1890.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order, made May 13, 1887, which affirmed a judgment in favor of plaintiffs, entered upon a verdict directed by the court.

John R. Dos Passos for appellant.

Edward W. Scudder Johnston for respondents.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

ISAAC B. POTTER et al., Respondents, *v.* THE NEW YORK
INFANT ASYLUM, Appellant.

(Submitted January 20, 1890; decided January 31, 1890.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made February 14, 1887, which affirmed a judgment in favor of plaintiffs entered upon the report of a referee.

Clark Bell for appellant.

C. F. Potter for respondents.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

H. JOLSEN'S TAENDSTIKFABRIKKER ENEBAK AND BYEN, Respond-
ents, *v.* HORACE K. THURBER et al. Appellants.

(Argued January 16, 1890; decided February 25, 1890.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made June 20, 1887, which affirmed a judgment in favor of plaintiff, entered upon a verdict.

This action was brought to recover damages for alleged breach of a contract to purchase all of the matches plaintiff could manufacture and ship in eight months following receipt of order.

At the close of the evidence defendants moved for a dismissal of the complaint on the ground, among others, that no such contract as alleged had been proved.

The motion was denied.

The court here, after a full examination and discussion of the evidence, reach the conclusion that the motion should have been granted.

E. More for appellants.

August Reymert for respondents.

BROWN, J., reads for reversal and new trial.

All concur, POTTER and BRADLEY, JJ., in result.

Judgment reversed.

JOHN B. LEVERICH, Respondent, *v.* WEEKS W. CULVER, et al. Appellants.

(Argued January 22, 1890 ; decided February 25, 1890.)

APPEAL from judgment of the General Term of the Court of Common Pleas for the city and county of New York, entered upon an order made June 6, 1887, which affirmed a judgment in favor of plaintiff, entered upon the report of a referee.

S. Jones for appellants.

Edward Cromwell for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed. _____

JAMES A. FARLEY, et al., Appellants, *v.* THE UNION LIFE INSURANCE COMPANY, Respondent.

(Argued January 24, 1890 ; decided February 25, 1890.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon

an order made June 28, 1886, which reversed a judgment in favor of defendant, entered upon a decision of the court on trial at Special Term and ordered a new trial.

Raphael J. Moses, Jr., for appellants.

Merritt E. Sawyer for respondent.

Agree to affirm; no opinion.

All concur, except HAIGHT, J., not sitting.

Judgment affirmed.

CHARLES HEROLD, Respondent, v. THE MANHATTAN
RAILWAY COMPANY, Appellant.

(Argued January 27, 1890; decided February 25, 1890.)

APPEAL from judgment of the General Term of the Court of Common Pleas for the city and county of New York, entered upon an order made January 10, 1887, which affirmed a judgment in favor of plaintiff, entered upon a verdict.

Henry D. Sedgwick for appellant.

Charles Steckler for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

ALMA McCORD, Appellant, v. THE TOWN OF OSSINING IN THE
COUNTY OF WESTCHESTER, Respondent.

(Argued January 28, 1890; decided February 25, 1890.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made July 2, 1887, which affirmed a judgment in favor of defendant, entered upon a report of a referee.

Francis Larkin for appellant.

Smith Lent for respondent.

Agree to affirm ; no opinion.

All concur, except HAIGHT, J., not sitting.

Judgment affirmed.

WILLIAM HOLDRIDGE, Appellant, *v.* EURYDICE L. HICKS et al.,
Respondents.

(Submitted January 31, 1890; decided February 25, 1890.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made January 15, 1886, which affirmed a judgment in favor of defendants, entered upon a decision of the court on trial at Special Term.

L. M. Norton for appellant.

C. C. Davison for respondents.

Agree to affirm ; no opinion.

All concur, except BRADLEY and HAIGHT, JJ., not sitting.

Judgment affirmed.

THE SAINT NICHOLAS BANK, Respondent, *v.* PERCY R. KING,
Impleaded, etc., Appellant.

(Argued January 30, 1890; decided March 4, 1890.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made May 6, 1887, which affirmed a judgment in favor of plaintiff entered upon a verdict by the court, and affirmed an order denying a motion for a new trial, and affirming an order vacating a judgment against two of the defendants, entered previous to the trial.

David Willcox for appellant.

Edwin B. Smith for respondent.

Agree to affirm ; no opinion.

All concur except FOLLETT, Ch. J., dissenting, and HAIGHT, J., not sitting.

Judgment affirmed.

MICHAEL J. DALY, Respondent, *v.* JOSHUA C. SANDERS,
Appellant.

(Submitted February 24, 1890; decided March 11, 1890.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, in favor of plaintiff, entered upon an order made June 18, 1887, on a submission of a case under section 1279 of the Code of Civil Procedure.

Joshua C. Sanders appellant in person.

Daniel Daly for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

INDEX.

ACCEPTANCE.

The right to recover damages for breach of an express warranty on sale of goods survives acceptance. *F. C. Co. v. Metzger* 260

ADVERSE POSSESSION.

In an action to recover possession of certain real estate in the city of New York, it appeared that the premises in question were part of a farm owned by B. in his lifetime. The earliest deed produced by plaintiff was one executed in 1835 to S., the grantor in which, was described as the only child and heir-at-law of B.; the truth of this recital was established by the evidence. As early as 1825 said farm was occupied by McG., a son of said grantor, who cultivated it until 1883, during which time said grantor lived at her homestead in the neighborhood and frequently visited her son at the dwelling-house on the farm, and was in constant communication with him. When his occupation ceased, the farm was rented. *Held*, that possession in said grantor was sufficiently established. *Dunham v. Townshend*, 281

APPEAL.

1. Where, on the trial of an action by the court, the testimony is conflicting and the judgment of the trial court is reversed by the General Term upon the facts, as the trial court has the advantage of seeing and hearing the witnesses, its determination as to their credibility will be taken upon appeal to this court, and the evidence will be examined simply for the purpose of determining whether it is sufficient to authorize its findings. *Von Wien v. S. U. & N. Ins. Co.* 94

2. Where a finding of fact by a court or referee is without evidence to support it, it is a ruling upon a question of law (Code Civ. Pro. § 993) and if excepted to, presents a legal question reviewable here. *Halpin v. P. Ins. Co.* 165

8. It is not necessary for the purposes of such review, that the case should show that it contains all the evidence; the exception appearing in the proposed case serves as a notice to the respondent of an intention to raise the question of legal error, and puts on him the responsibility of adding, by amendment, any omitted evidence on the question. *Id.*

4. Where, no objection is taken by the pleadings to a failure to allege payment into court, of money tendered, the act may be performed on trial, and, in the absence of any objection then taken, the presumption on appeal is that it was performed. *Id.*

5. In an action to recover damages occasioned by a fire, alleged to have been caused by the negligence of defendants, which destroyed two buildings owned by plaintiff, evidence offered by plaintiff for the purpose of proving the amount of damages by the destruction of one of them, was excluded on the ground that, as to that building, defendants alleged negligence was not the proximate cause of such burning. A general verdict was rendered for the defendants. *Held*, that as the verdict exculpated defendants entirely from the charge of negligence the rejection of evidence as to the amount of damages, even if erroneous, could not have prejudiced plaintiff, and so, was not a ground for reversal. *Read v. Nichols*, 224

6. At the close of the evidence, plaintiff's counsel presented to the

court thirteen separate requests to charge. Some were charged as requested, some in a modified form and others refused. At the close of the charge plaintiff's counsel stated that he excepted, "to the refusals to charge as requested by plaintiff's counsel in so far as the court did refuse and to each of the refusals to charge as requested." *Held*, that this exception was not sufficiently definite and specific to present a question for review. *Id.*

7. Five written propositions were submitted by the court to the jury with instructions that each should be answered as they determined the fact to be. Plaintiff's counsel excepted to such submission. Upon the coming in of the jury the foreman stated that they had agreed upon a general verdict; the counsel for both parties thereupon consented and the court announced that the special questions were withdrawn from the jury and then a general verdict in favor of the defendants was rendered. The first question, as it appeared in the case on appeal, had the word "yes" written under it. Plaintiff insisted that the proposition answered in the affirmative should be regarded and treated as a fact found by the jury. *Held*, untenable; and that the consent to the withdrawal of the questions constituted a waiver of the exception to their submission. *Id.*

8. On appeal to this court from a judgment entered at General Term, "upon a verdict subject to the opinion of the court," the return must contain a "statement of the facts, of the questions of law arising thereupon, and of the determination of those questions by the General Term," as required by the Code of Civil Procedure (§ 1339); without such a statement the appeal may not be heard. *Covenhoven v. Ball*. 231

9. *It seems*, objections which are in the case, arising upon the evidence and involved in the controversy between the parties, are meritorious and available to the unsuccessful party on appeal although

they may not have been considered in the lower court. *Id.*

10. Objections, however, to the proceedings not connected with the matters in issue, but which are preliminary and go only to the right and power of the court to hear the case, are technical and are deemed to have been waived if the party proceeds with the trial or argument without raising them. *Id.*

11. It appeared that said premises were conveyed by S. to H. On the trial plaintiff introduced in evidence a deed from the sheriff to one A., which recited the issuing of an execution against H., the seizure and sale by virtue thereof of the premises conveyed, and the redemption of the land by A., the grantee, the holder of a subsequent judgment against H. On the trial at the General Term, this deed was objected to as invalid, because the judgment on which this execution was issued was not produced and read in evidence. On the argument in this court plaintiff produced a certified copy of the judgment-roll. *Held*, that it could be properly received; and its production removed the objection to the sheriff's deed. While the production of record evidence is never allowed in an appellate court for the purpose of reversing a judgment, it may be permitted for the purpose of sustaining one. *Dunham v. Townsend*. 281

12. It is competent for an appellate court on appeal from a judgment, when an error on the trial does not involve the right of recovery, but simply the amount, and the effect thereof can be clearly and definitely determined on the evidence before it, to permit the respondent to consent that the judgment may be corrected by deducting therefrom the amount erroneously included and to affirm the judgment as modified. *Vail v. Reynolds*. 297

13. This rule applies to actions of torts, as well as to actions on contract. *Id.*

14. A reversal of a judgment will not be granted because a finding of fact

- is without evidence to support it, unless it is a material fact and to some extent at least gives support to the judgment rendered. *Wetmore v. Bruce.* 819
15. *It seems*, under the provision of the act of 1883 (§ 10, chap. 205, Laws of 1883), establishing the board of claims, which authorizes an appeal to this court from an award by said board when the amount in controversy exceeds \$500, the amount in controversy is the amount of the claim presented, or the amount which the board of claims may legally award the claimant under the proofs, including interest, in a proper case for the allowance of interest. *Folta v. State.* 406
16. Where an order of General Term reversing a judgment entered on a verdict states that the facts were not before that court for revision and that its decision was upon the law only, the legal questions are reviewable here. *Van Wycklen v. City of Brooklyn.* 424
17. The parties to an action are not bound to limit the issues to be tried to those made by the pleadings, but may by mutual consent try any other issues, and an appellate court in reviewing such a case is only called upon to determine whether the parties have consented to try the substituted issues, and if so whether the decisions of the trial court upon those issues are according to law. *Frear v. Sweet.* 454
18. In the absence of amended pleadings or of a written stipulation the appellate court may infer the consent to try such substituted issues from evidence offered upon the one side and the absence of objections, or the character of the objections, upon the other. *Id.*
19. Where part of an answer given to a proper question is not responsive, an objection and exception thereto does not present the question for review as to whether the testimony is competent; it can only be presented by motion to strike out. *W. C. & M. Co. v. Holbrook.* 586

— *Determination of trial court as to amount of damages not reviewable here.*

See People ex rel. v. M. M. P. Union. 101

— *An error in reception of evidence which could have done no injury, will not justify a reversal.*

See Frear v. Sweet. 454

ARREST.

1. If, when a judgment is paid to the attorney of the judgment-creditor the debtor is in custody, either actual or constructive, under an execution issued against his person upon such judgment, it is within the power of the attorney to authorize the sheriff to discharge him. *Davis v. Boue.* 55
2. Where an order to discharge, signed by the attorney, is served upon the sheriff, it carries with it the presumption that it was duly authorized. *Id.*
3. While this presumption may not be conclusive upon the sheriff, it requires some action on his part, either to return it or give notice that he requires something farther, or else to act upon it as sufficient. *Id.*
4. Where, therefore, a judgment was paid and discharged of record, and the sheriff received without objection such an order to discharge the judgment debtor, who was out on bail and subsequently rearrested him. *Held*, he was liable for false imprisonment. *Id.*

ASSAULT AND BATTERY.

One B. entered into possession of certain premises as plaintiff's tenant. Defendant, who claimed title under a tax sale, presented his deed and demanded possession of B. The latter surrendered the house keys and agreed thereafter to continue in possession as defendant's tenant. Plaintiff went to the house with a carpenter to put on new locks, and while so engaged defendant entered and ordered her

to leave and on her refusal attempted to eject her. In an action for assault and battery, the court charged that plaintiff was at the time in possession and had the right to use reasonable force to retain possession; and that defendant had no right to use force to acquire possession. *Held* (FOLLETT, Ch. J. dissenting), no error. *O'Donnell v. McIntyre*. 156

ASSESSMENT AND TAXATION.

1. As the right to make assessments upon the lands of cemetery associations in the city of Buffalo, is provided for by the local laws applicable to that city alone (Chap. 519, Laws of 1870; chap. 154, Laws of 1871), which authorize an assessment upon such lands for grading an adjoining street, *held*, that those provisions were not repealed by the act of 1879 (Chap. 310, Laws of 1879), which declares that no land actually used for cemetery purposes shall be sold under execution for any tax or assessment; and that such an assessment was valid. *B. C. Association v. City of Buffalo*. 61

2. Also, *held*, the fact that said act of 1879 especially excludes the city of Rochester, did not authorize the inference of an intent to repeal the said acts applicable to Buffalo. *Id.*

See TAX SALES.

ASSIGNMENT.

— *When assignee of policy of life insurance, transferred to secure a debt, entitled to recover full amount of policy.*
See Wright v. M. B. L. Association. 237

ASSIGNMENT (FOR BENEFIT OF CREDITORS).

1. A general assignment for the benefit of creditors, relating solely to the property of a general partnership, all of which is personal, and reciting that it is made by the firm to which the firm name is subscribed by one of the partners,

who declares in the certificate of acknowledgment "that he executed the same as and for said firm (giving its name) and under its authority and instructions of the members of said firm," is not void on its face by reason of the manner of its execution; such an assignment may legally be executed in the name of the firm, by one of the partners, if done with the oral assent of all. *Hooper v. Baillie*. 418

2. In an action by firm creditors to set aside such an assignment, if the plaintiff desires to raise the question as to the assent of the other partners, it should be presented by the pleading. *Id.*

3. If so presented, the burden is upon the plaintiff to establish that the assignment was executed without their assent. *Id.*

4. In such an action the complaint alleged that the assignment was made with intent to defraud; this was put in issue by the answer. It appeared that the firm was engaged in business in New York, having a branch house in Brazil; it was composed of three partners, two of whom resided in New York, the other in Brazil. B., one of the New York partners, executed the assignment; J., the other, testified that shortly before its execution B. told him that if they did not get remittances from Brazil they would have to make an assignment; the witness answered "If we must do it, then we must;" also, that he did not remember any other conversation with B. in reference to the assignment, but would not swear there was none. Plaintiff also, after proving by the assignee that he saw a cable from W., the Brazilian partner, dated before the assignment, assenting to it without qualification, put in evidence a letter from W. to the assignee, to the effect that he confirmed by cable the assignment of the assets of the New York firm only, it being out of his power to do more, as under Brazilian law it was necessary to settle claims there before remittance of any moneys abroad. It also appeared, and the trial court found, that W., after

converting the assets in Brazil into money and paying local claims, remitted the balance to the assignee. The referee also found that J. never objected to or questioned the assignment either before or after the execution. The assignee and one of the assignors, called as witnesses for the plaintiff, both testified that the assignment was made in good faith, and there was no evidence to the contrary. At the close of the evidence the defendants counsel requested the court to find the issue of fact in their favor; it refused, to which defendants excepted. The court found that the assignment was made without the authority or assent of J. and W., to which finding the defendants excepted. The court found as conclusion of law that the assignment was fraudulent and void as against plaintiffs. *Held*, that the findings were erroneous; and that the refusal to find and the finding of fact, there being no evidence to sustain it were, under the exceptions, reviewable in this court. (Code Civ. Pro. §§ 992, 993.) *Id.*

ATTORNEY AND CLIENT.

If, when a judgment is paid to the attorney of a judgment-creditor the debtor is in custody, either actual or constructive, under an execution issued against his person upon such judgment, it is within the power of the attorney to authorize the sheriff to discharge him. *Davis v. Bowe.* 55

BAIL.

1. Where an undertaking given to discharge a defendant from arrest, in an action for embezzlement, instead of being in precise compliance with the provisions of the Code of Civil Procedure in reference thereto (§ 575), followed the requirements of the Code of Procedure (§ 187); and so, in excess of the present statutory requirements, contained the condition that defendant would render himself amenable to the process of the court during the pendency of the action, *held*, that the word "process" as used referred only to such

mandates of the court as are issued to enforce a decree or judgment; that as no process could be issued against defendant prior to the rendition of judgment, the extra condition added in no degree to the statutory obligation; and so, might be disregarded as surplusage. *Haberstro v. Bedford.* 187

2. *It seems* the intent of the provision of the Code of Procedure was to provide for bail in both legal and equitable actions; the provision that defendant would render himself amenable to process during pendency of the action being intended to be applicable only to actions for equitable relief, wherein an order of arrest in place of a writ of *ne exeat* had been issued. *Id.*

3. Where the sureties to such an undertaking are excepted to and refuse to justify, it is not the duty of the sheriff to take active measures, such as rearresting the defendant, to relieve them from liability; nor can the sureties surrender their principal and so relieve themselves from further responsibility, and a certificate of the sheriff that they have surrendered, does not, in the absence of proof that they relied thereon, and by reason thereof have sustained injury, estop that officer from asserting their liability to him as fixed by the Code of Civil Procedure. (§ 589.) *Id.*

4. After the discharge of a defendant from arrest on giving an undertaking, and after failure of the sureties to justify, the defendant was, by virtue of a County Court order in proceedings instituted in part upon the affidavits of one of the sureties, taken by the sheriff to an inebriate asylum; that officer having been advised by his counsel that it was his duty to obey the order, and if he failed so to do he would be guilty of contempt. The order was in fact void. While defendant was in the asylum an execution against his person was issued to the sheriff and returned by him unsatisfied. Thereafter the defendant was brought back from the asylum and taken into custody by the sheriff, who by advice of counsel accepted an un-

dertaking from him and discharged him from arrest. Subsequently the sheriff took various steps for the purpose of procuring the exoneration of himself as bail and the relief of the sureties in the original undertaking, by advice of their counsel and his own, and at the request of one of said sureties, he promising to pay the expense incurred. In an action by the sheriff against said sureties, *held*, their omission to justify rendered them liable; that plaintiff's action in obeying the void County Court order, and in attempting to relieve them and himself, although he made a mistake and was ill-advised, furnished no defense; that he had a right to rely upon the indemnity furnished by defendant's undertaking, and was not required to take any affirmative action to relieve them.

Id.

BANKS AND BANKING.

1. A bank, by the certification of a check, represents that it has on deposit the amount, and agrees that it will retain that amount and apply it in payment, provided, however, that the check shall be indorsed by the payee. *G. N. Bank v. Bingham.* 349
2. Where the check, therefore, is transferred without indorsement, the bank is not estopped by the certification from questioning the validity of the check. *Id.*
3. When a bank has been induced to certify a check by fraudulent representations on the part of the drawer and the check has been transferred without indorsement, an action is not maintainable on its part to recover possession of the check. *Id.*
4. M. drew a check on defendant, a Pennsylvania bank, with which she had an account, payable to the order of C., and mailed it to him at Indianapolis; C. indorsed it in blank and delivered it to the H. bank for collection. The H. bank indorsed the check "for collection" and forwarded it to plaintiff, its correspondent bank in New York, "for credit;" it was received and

credited to the H. bank in general account, plaintiff reserving the right to charge it back if dishonored. It did not appear that plaintiff knew or suspected that the H. bank was acting simply as a collecting agent. Plaintiff indorsed the check the day it was received "for collection and remittance," mailed it to defendant, with directions to remit by draft payable in New York city. Defendant received the check the next day, charged it to M.'s account and cancelled it, and on the same day mailed to plaintiff its draft payable to plaintiff's order on a bank in New York city for the amount, less a charge made against plaintiff for the services. The H. bank having failed, M., the drawer of the check, and C., the payee, after the check had been so paid and cancelled and the draft mailed to plaintiff, but before it was presented for payment, requested defendant to stop payment, which it did, and the draft on presentation was dishonored. In an action upon the draft, *held* (BRADLEY and BROWN, JJ., dissenting), that plaintiff was entitled to recover; that the check of M. having been charged to the account of the drawer and cancelled, and a draft therefor delivered to plaintiff, defendant had legally discharged its duty to the drawer and was released from liability thereon; that it could not thereafter assert, as against plaintiff, who was its principal, the legal rights or equities of a third person; that neither plaintiff nor defendant was an agent for C.; and conceding the latter could maintain an action against plaintiff to recover the amount of the check, as to which, *quære*, this was not available to defendant as a defense, as no contract relation existed between it and C., nor was there any privity between them. *C. E. Bank v. F. N. Bank.* 443

5. A check drawn upon plaintiff by one of its depositors, was altered by raising the amount and changing the name of the payee; it was delivered to the N. Y. & B. D. E. Co., an express company, for collection, indorsed in blank with the name of the fictitious payee. The

express company transmitted and indorsed the check for collection to defendant's company, the W. E. Co. That company presented the same for payment and received the amount called for by it as raised, which it delivered to the N. Y. & B. D. E. Co., and that company delivered it to the person from whom it had received the check. Thereafter the fraud was discovered and the amount overpaid demanded back. *Held*, that an action to recover the same was not maintainable; that plaintiff was advised by the indorsement that defendant's company was simply acting as agent, and it having in good faith, before notice of the fraud, paid over the money to the company from whom it received the check, was thereby discharged from liability. *N. C. Bank v. Westcott*. 468

certification from questioning the validity of the check. *Id.*

6. When a bank has been induced to certify a check by fraudulent representations on the part of the drawer and the check has been transferred without indorsement, an action is not maintainable on its part to recover possession of the check. *Id.*

7. The cashier of the appellant was induced by the false representations of B. to cash a draft drawn by him, place the proceeds to his credit and certify the check of B., payable to his own order. B. presented the certified check, unindorsed, to respondents, who cashed the same. While they held the check unindorsed the appellant notified them of the fraud and demanded its return, and, they refusing, commenced an action to recover its possession. The respondents subsequently obtained the indorsement of B., and payment having been refused, brought an action to recover the amount. *Held*, that neither action was maintainable. *Id.*

8. M. drew a check on defendant, a Pennsylvania bank, with which she had an account, payable to the order of C., and mailed it to him at Indianapolis; C. indorsed it in blank and delivered it to the H. bank for collection. The H. bank indorsed the check "for collection" and forwarded it to plaintiff, its correspondent bank in New York, "for credit;" it was received and credited to the H. bank in general account, plaintiff reserving the right to charge it back if dishonored. It did not appear that plaintiff knew or suspected that the H. bank was acting simply as a collecting agent. Plaintiff indorsed the check the day it was received "for collection and remittance," mailed it to defendant, with directions to remit by draft payable in New York city. Defendant received the check the next day, charged it to M.'s account and cancelled it, and on the same day mailed to plaintiff its draft payable to plaintiff's order on a bank in New York city for the amount, less a charge made against plain-

BILLS, NOTES AND CHECKS.

1. The purchaser of a certified check, payable to order, who obtains title without indorsement by the payee, holds it subject to all equities and defenses existing between the original parties, although he paid full consideration, without notice. *G. N. Bank v. Bingham*. 349

2. An intention on the part of the payee and transferee to have the paper indorsed is not sufficient, at least in the absence of an express agreement to indorse; it is the act of indorsement not the intention which negotiates the instrument. *Id.*

3. An indorsement, after notice of a defense, does not relate back to the transfer, so as to cut off the intervening rights and remedies of the party giving the notice. *Id.*

4. A bank, by the certification of a check, represents that it has on deposit the amount, and agrees that it will retain that amount and apply it in payment, provided, however, that the check shall be indorsed by the payee. *Id.*

5. Where the check, therefore, is transferred without indorsement, the bank is not estopped by the

tiff for the services. The H. bank having failed, M., the drawer of the check, and C., the payee, after the check had been so paid and cancelled and the draft mailed to plaintiff, but before it was presented for payment, requested defendant to stop payment, which it did, and the draft on presentation was dishonored. In an action upon the draft, *held* (BRADLEY and BROWN, JJ., dissenting), that plaintiff was entitled to recover; that the check of M. having been charged to the account of the drawer and cancelled, and a draft therefor delivered to plaintiff, defendant had legally discharged its duty to the drawer and was released from liability thereon; that it could not thereafter assert, as against plaintiff, who was its principal, the legal rights or equities of a third person; that neither plaintiff nor defendant was an agent for C.; and conceding the latter could maintain an action against plaintiff to recover the amount of the check, as to which, *quære*, this was not available to defendant as a defense, as no contract relation existed between it and C., nor was there any privity between them. *C. E. Bank v. F. N. Bank.* 448

9. A check drawn upon plaintiff by one of its depositors, was altered by raising the amount and changing the name of the payee; it was delivered to the N. Y. & B. D. E. Co., an express company, for collection, indorsed in blank with the name of the fictitious payee. The express company transmitted and indorsed the check for collection to defendant's company, the W. E. Co. That company presented the same for payment and received the amount called for by it as raised, which it delivered to the N. Y. & B. D. E. Co., and that company delivered it to the person from whom it had received the check. Thereafter the fraud was discovered and the amount overpaid demanded back. *Held*, that an action to recover the same was not maintainable; that plaintiff was advised by the indorsement that defendant's company was simply acting as agent, and it having in good faith, before notice of the fraud, paid over the money to the

company from whom it received the check, was thereby discharged from liability. *N. C. Bank v. Westcott.* 468

10. The complaint, after averments as to the fraudulent alteration of the check, alleged that the "check so altered, changed and raised, and properly indorsed, was presented" by the agent of the W. E. Co. The answer admitted that the check "properly indorsed" was presented for payment as alleged in the complaint. *Held*, that this was not an admission that the check was indorsed by the W. E. Co. *Id.*
11. The agent who presented the check for payment indorsed his name simply upon it without adding the word agent. *Held*, that in the absence of proof of express authority in such agent to indorse, the W. E. Co. was not chargeable as indorser; that as it appeared by the restrictive indorsement upon the check that defendant had taken no title and was simply acting as agent, there was no implied authority in its agent to do anything beyond what was requisite to the performance of the agency, and this imposed upon defendant neither the duty to indorse nor to guarantee the check. *Id.*

BILLS OF LADING.

1. Plaintiff shipped certain goods, by defendant's road, to be transported from B. to A., consigned to herself. By the bill of lading it was provided that upon the arrival of the goods at the place of destination, and when "placed upon the platform or in the storeroom of the company * * * awaiting delivery there to the consignee * * * or to be taken from the car by the consignee," the goods shall be held by defendant "under the liability of a warehouseman and not as a carrier." *Held*, that under the bill of lading defendant had the option on arrival of the goods to retain them in the car, or to place them in its warehouse, and in either case its liability as a common carrier ceased after the

consignee had had a reasonable time to call for and remove them
Draper v. Prest., etc., D. & H. Co.

2. Plaintiff did not reside in A., and was not there when the goods arrived; some days after, her agent called at the defendant's freight house in that place and was informed that they had arrived and had been unloaded; he expressed regret at the unloading, as he contemplated their removal to another place and asked to have them stored for a few days, to which the freight agent assented. The goods had not in fact been unloaded, but were in a car standing near the freight depot; they were left in the car for about twelve days thereafter, when they were destroyed by fire. In an action to recover for the loss, *held*, that whether the goods were held under the bill of lading or under the arrangement made by plaintiff's agent, in either case defendant was liable as warehouseman not as carrier; that as warehouseman it was liable only in case of negligence on its part, causing the fire or in the care of the goods after the fire commenced; that upon this question the burden of proof was upon plaintiff; and that, as her evidence failed to show negligence, she was properly nonsuited.

Id.

3. Plaintiffs shipped a cargo of leather, under a bill of lading which provided that the carrier should have the full benefit of any insurance that may have been effected upon the goods. The goods having been injured through the negligence of the carrier's employes, plaintiff brought this action upon a policy issued thereon by defendant, which provided that in case of loss defendant should be subrogated to plaintiffs as to all claims against the transporters of said merchandise, not exceeding the amount paid by said insurer, and that plaintiffs would make no agreement or do any act whereby this right of action against the carrier for losing or injuring the leather should be released or cut off. *Held*, that the provision in the bill of lading cut off the insurer's

Plaintiff, by his answer therein, alleged that no process was served upon him in the South Carolina action, and that he neither appeared nor authorized an appearance in his behalf. Under a compromise agreement plaintiff paid defendant \$500 and the latter gave his bond, conditioned to indemnify and save plaintiff harmless against all claims set forth in the complaint in that action and against all costs and damages plaintiff may be compelled to pay, by reason of said action or the claims upon which the same is based. The legal title to the South Carolina judgment was afterwards assigned to defendant, who brought an action upon it against plaintiff, alleging that he was induced to compromise with him by fraud. Plaintiff answered, and the complaint was dismissed, because of the omission of defendant to tender back the \$500. This action was brought upon defendant's bond, to recover the costs and expenses incurred by the plaintiff in excess of those recovered in the action. Defendant set up as a counter-claim that he compromised with plaintiff, relying upon the truth of his allegations in his answer in the suit brought by W. in this state, and otherwise made by him; that such allegations and representations were false and fraudulent, and asked to recover the damages sustained by reason of the fraud. *Held*, that defendant's liability upon his bond was not limited to such costs and damages as plaintiff should incur in the prosecution of the claim against him by W., but included such as should arise from the prosecution of it by any other party having title to it; that the answer set up a proper counter-claim; that as the counter-claim seeks not to rescind the compromise, but simply to recover damages, because of the alleged fraud, no restoration of the \$500 so received by plaintiff from defendant upon the compromise was essential, but it might be retained by him and taken into consideration on the question of damages. *Thomson v. Sanders*. 252

See UNDERTAKING.

BRIDGES.

1. In an action brought by the commissioner of highways of the town of H. against the commissioners of highways, of the towns of W. C. and C. to recover back moneys, alleged to have been paid by plaintiff in repairing a bridge between said towns, in excess of the proportion of plaintiff's town; it appeared that the stream crossed by the bridge divided the town of H. from the towns of W. C. and C., and that the commissioners of the three towns worked together in making the repairs; it was understood that plaintiff was to pay one-half of the expense and the commissioners of the other two towns each one-fourth; after the repairs were completed, the three commissioners accounted with each other and a final adjustment of accounts was had on the basis above stated; they respectively submitted their accounts for audit and upon their being audited, each commissioner was reimbursed by taxes collected from his town. *Held*, that conceding each town should have paid one-third of the expense, the error on the part of plaintiff was one of law and not of fact and the overpayment made by him could not be recovered back; that when plaintiff exceeded the proportion of the expense with which he was authorized to burden his town his act was individual and not official and the rule as to voluntary payments applied; that the town could not by subsequently reimbursing him alter or affect the legal status of the parties as it existed prior to such reimbursement. *Flynn v. Hurd*. 12
2. Also *held*, that the action was not maintainable because the requirements of the statute establishing the precedent condition upon which the liability of a town for the repair of a bridge is enforceable had not been complied with. *Id*.
3. The duty to repair does not alone in such case authorize the making of the repairs by the commissioners of one of two towns jointly liable and the maintenance of an action against the commissioner

of the other town to recover its proportion; it must appear that notice was given as prescribed by statute (§ 8, chap. 225, Laws of 1841, as amended by chap. 383, Laws of 1857), and that the commissioner notified did not within the time prescribed consent or did not unite in making the repairs.

Id.

BROKER.

1. Where brokers who had sold wheat short for a customer on a margin bought in without authority on his account, and he, on being advised thereof, repudiated the purchase and subsequently directed the brokers to purchase for him at a price specified, which they refused to do, and it appeared that wheat could have been purchased in the market for several days after the order at the price named, *held*, that plaintiff's damages were the amount defendants would have been indebted to him, had they made the purchase as directed; that for the purpose of the remedy plaintiff's position was not affected by the unauthorized purchase; that the breach of contract was in the refusal of defendants to purchase when and as instructed, and this fixed the measure of damages. *Campbell v. Wright.* 594
2. The distinction between such case and one of a purchase by a broker for his customer on a margin pointed out. *Id.*

BROOKHAVEN (TOWN OF)..

1. In an action to recover lands under water of Great South bay, Long Island, plaintiff claimed title under the Nicholls charter of 1666, and the Dongan charter of 1686, to the inhabitants and freeholders of the town of Brookhaven; defendant claimed under two Indian deeds dated April 8, 1692, and April 9, 1693, and a patent from the governor-in-chief of the Province of New York to S., dated October 9, 1693, which included the land in question. Defendants proved from the town records the followin

lutions, or that they were ever brought to the knowledge of S., or that he ever heard of them. The evidence that the inhabitants of the town took fish from the bay was confined mainly to the period between 1862 and 1879, when the town under an agreement with defendant S., controlled the bay. A few instances prior to 1862 were proved, but it was not shown that the persons acted under authority from the town. There was no evidence that defendant S., or any of his ancestors, ever by word or act admitted the right of the town to control the fishing in the bay. In 1862 the town, under an agreement with defendant S., took from him a deed of the property in question; this agreement was subsequently annulled by the parties thereto. *Held*, that the evidence failed to show user by plaintiff; and that a refusal to submit the question to the jury was not error. *Id.*

BUFFALO (CITY OF.)

1. As the right to make assessments upon the lands of cemetery associations in the city of Buffalo, is provided for by the local laws applicable to that city alone (Chap. 519, Laws of 1870; chap. 154, Laws of 1871), which authorize an assessment upon such lands for grading an adjoining street, *held*, that those provisions were not repealed by the act of 1879 (Chap. 810, Laws of 1879), which declares that no land actually used for cemetery purposes shall be sold under execution for any tax or assessment, and that such an assessment was valid. *B. C. Association v. City of Buffalo.* 61
2. Also, *held*, the fact that said act of 1879 especially excludes the city of Rochester, did not authorize the inference of an intent to repeal the said acts applicable to Buffalo. *Id.*

BURDEN OF PROOF.

1. Where, in an action of ejectment, the plaintiff establishes title by proper and sufficient conveyance

and possession prior to the entry by defendant, and that entry is not attempted to be justified by any claim of right, the burden of establishing a better title than plaintiff's is cast upon defendant. *Dunham v. Townsend.* 281

2. In an action by the owner of goods delivered to a commission merchant for sale, against the latter, to recover as for money had and received, the proceeds of sale, it is incumbent on the plaintiff to show either that the defendant has actually received pay for the goods, or such a state of facts as will preclude him from denying receipt. *Rosenberg v. Block.* 329

— *When common carrier ceases to be liable as such, and becomes liable only for negligence, and burden of proving this devolves on shipper.*

See Draper v. President, etc., D. & H. C. Co. 118

— *In action by firm creditors to set aside assignment of firm property for benefit of creditors, executed by one of the copartners, the burden of proof is upon plaintiffs to establish that it was executed without assent of the other parties.*

See Hooper v. Baillie. 418

— *An agent simply authorized to complete a contract for the purchase of real estate and take a deed, has no power to add to the stipulated consideration by assigning a contract made by the vendor to pay for services in procuring a reduction or vacation of an assessment on the premises; the burden is upon the party employed to show authority in the agent.*

See Deering v. Starr (Mem.). 665

BUSINESS CORPORATIONS.

1. In an action against an officer of a corporation, incorporated under the act of 1875 (Chap. 611, Laws of 1875), providing for the organization of certain business corporations, to enforce the liability for a debt of the corporation imposed by said act (§21), because of the signing of a certificate or report false in a material representation it is not necessary to show knowledge on the part of the officer at

the time of signing ; proof that the writing is untrue, "in any material representation" is sufficient. *Huntington v. Attrill*. 365

2. The provision of said act giving such remedy, is not violative of the constitution. *Id.*

3. On trial of such an action the jury are not required to give the defendants the benefit of any reasonable doubt, in the sense applicable to criminals; but, may govern their action in reaching a result by the fair preponderance of evidence. *Id.*

4. The "fair value" contemplated by the provision of said act (§ 14), prohibiting the issuing of stock of a corporation organized under it for property, except for "property actually received for the use and legitimate purpose of said corporation, at its fair value," is that which the property has at the time of the sale; it is not dependent upon the subsequent success or failure of the investment, further than that result may have been legitimately within evidential contemplation at the time of the sale, in view of the uses for which it may have had available advantages within itself. *Id.*

5. In an action under said act, against directors of a corporation organized under it, the alleged false representation was that the whole capital stock, \$700,000, had been fully paid in. The object of the corporation, as stated in its certificate of organization, was the purchase of lands and building thereon a seaside hotel, bath-houses, etc. It appeared that the whole stock was issued to A., one of the defendants, in payment for 120 acres of land on the sea shore which was conveyed, subject to a mortgage of \$72,000, the payment of which was assumed by the company. *Id.*

6. This land was part of 140 acres purchased by A. six months before the organization of the company, and in contemplation thereof, for \$80,000, of which he paid \$8,000 and gave the said mortgage to secure the balance. The defendants were directors of the company at

- was competent to show the company had the benefit of the loan, as bearing upon the question as to whether it was its debt. *Id.*
10. In response to a request by defendants to charge that before a verdict could be found for plaintiff the jury must be satisfied by affirmative proof that S. was authorized to indorse the name of the company, by prior resolution of the executive committee or board of directors or by ratification, by resolution, or some equivalent act, the court charged that the jury must find either prior authority, or subsequent ratification, which could be evidenced by general course of business as well as by resolution. *Held*, no error. *Id.*
 11. Plaintiff was permitted to prove, on the question of value, that the land purchased, with extensive improvements thereon, was afterwards sold at judicial sale for \$175,000. *Held*, no error. *Id.*
 12. *It seems* that officers assuming the responsibility and charged with the duties of the management of the business of a corporation are chargeable with knowledge as to matters which are open to observation and legitimately subject to their inspection and control. *Id.*
 13. In an action against the directors of a corporation, organized under the act of 1875 (Chap. 611, Laws of 1875), providing for the organization of certain business corporations, to recover a debt of the corporation, on the ground that defendants had signed a certificate, stating that the capital stock had been paid in, which was false, a report was offered in evidence by plaintiff, which was signed by the commissioners, to whom a license to open books for subscription to the capital was issued, which stated that the books were opened for subscriptions to the stock; that certain persons subscribed, each one at the time paying in cash ten per cent of the par value of each share so subscribed for; that at least one-half of the stock was subscribed in accordance with the statute, and that a meeting was then called, by-laws made and directors of the company elected. Defendants were two of those commissioners. Objection was made to so much of this report as related to the action of the commission; this was overruled. It afterwards appeared, but had not then been shown, that ten per cent of the subscription had been paid in cash. *Held*, that the reception of the evidence was not error; that the report was part of the statutory proceedings to complete the organization of the company and was competent. *Hatch v. Attrill.* 383
 14. The whole stock of the company was issued in payment for a piece of land conveyed to the company by defendant A., which plaintiff claimed was of much less value than the amount of the stock. One of the plaintiff's witnesses gave, without objection, his opinion as to the value of the property so conveyed; after his cross-examination defendant's counsel moved to strike out this evidence as incompetent. This motion was denied. *Held*, no error; that the ruling was within the discretion of the court; that if the effect of the cross-examination upon the question of value was such that it was not entitled to any consideration, defendant's counsel had the right to have the jury so instructed by charge of the court, but not to have it stricken out on motion. *Id.*
 15. Defendants offered to show that the certificate in question was filed in consequence of a suggestion of F., one of the original plaintiffs, that one should be made and filed, for the purpose of relieving defendant A. from liability under the statute, which provides, that the stockholders shall be severally individually liable to the creditors of the company to an amount equal to that of stock held by them respectively, for all debts and contracts of such company, until the whole amount of the capital stock has been paid in and a certificate thereof been made and recorded. (§ 37.) The certificate filed made no reference to the property; this evidence was objected to and excluded. *Held*, no

error; that it did not tend to show acquiescence of F. in the truth of the certificate; nor could it be inferred from it, that a false certificate was within his contemplation, but rather, that the requisite statutory certificate should be made. *Id.*

16. After the jury retired they were directed by the court, with the consent of the parties, to bring in a sealed verdict the next morning, if they agreed in the meantime. They then presented a sealed verdict for plaintiff for \$50,000; the amount of the company's indebtedness to him was \$163,695.51. The court refused to receive the verdict and directed the jury to again retire and instructed them, that if they found a verdict for the plaintiffs, to find it for the full amount claimed, which they did. *Held*, no error; that the question as to whether or not plaintiff was entitled to recover, was one of fact for the jury, but when this was found for the plaintiff, the measure of damages was the amount of the debt, and this he was entitled to recover; that the court had power to refuse to receive a verdict, which was not such a one as the jury was legally at liberty to render, and before it was recorded, to send the jury back to reconsider it. *Id.*

CASE.

Where a finding of fact by a court or referee is without evidence to support it, it is a ruling upon a question of law (Code Civ. Pro. § 993), and if excepted to, it is not necessary for the purposes of review here, that the case should show that it contains all the evidence; the exception appearing in the proposed case serves as a notice to the respondent of an intention to raise the question of legal error, and puts on him the responsibility of adding, by amendment, any omitted evidence on the question. *Halpin v. P. Ins. Co.* 165

CASES REVERSED, DISTINGUISHED, ETC.

Haack v. Weicken (42 Hun, 486), reversed. *Haack v. Weicken.* 68

Caldwell v. Murphy (11 N. Y. 416), questioned. *Alberti v. N. Y., L. E. & W. R. R. Co.* 83

Strohm v. N. Y., L. E. & W. R. R. Co. (96 N. Y. 305), distinguished. *Alberti v. N. Y., L. E. & W. R. R. Co.* 87

Von Wien v. S. U. & U. Ins. Co. (22 J. & S. 276), reversed. *Von Wien v. S. U. & N. Ins. Co.* 94

Leeds v. M. G. L. Co. (90 N. Y. 26), distinguished. *People ex rel. v. M. M. P. Union.* 109

Smith v. Marrable (11 M. & W. 5), distinguished and questioned. *Franklin v. Brown.* 114

Wilson v. Hatton (2 Exch. Div. 386), distinguished and questioned. *Franklin v. Brown.* 114

Hovey v. Elliott (21 J. & S. 331), reversed. *Hovey v. Elliott.* 124

Hale v. O. N. Bk. (64 N. Y. 550), distinguished. *Hovey v. Elliott.* 137

Husted v. Ingraham (75 N. Y. 251), distinguished. *Hovey v. Elliott.* 137

Pierson v. McCurdy (100 N. Y. 608), distinguished. *Hovey v. Elliott.* 144

Hubbell v. Weldon (H. & D. Sup. 139), distinguished. *O'Donnell v. McIntyre.* 163

Porter v. Smith (107 N. Y. 531), distinguished. *Halpin v. P. Ins. Co.* 170

Cox v. James (45 N. Y. 557), stated as overruled. *Halpin v. P. Ins. Co.* 171

Johnson v. N. Y. B. F. Ins. Co. (39 Hun, 410), distinguished. *Halpin v. P. Ins. Co.* 173

Paine v. A. Ins. Co. (5 T. & C. 619), distinguished. *Halpin v. P. Ins. Co.* 173

Whitney v. B. R. Ins. Co. (72 N. Y. 11), distinguished. *Halpin v. P. Ins. Co.* 173

A. L. Works v. W. C. F. Ins. Co. (2 Fed. Rep. 488), distinguished. *Halpin v. P. Ins. Co.* 174

- Keith v. Q. M. F. Ins. Co.* (10 Allen, 228), distinguished. *Halpin v. P. Ins. Co.* 174
- Ashworth v. Ins. Co.* (112 Mass. 422), distinguished. *Halpin v. Phenix Ins. Co.* 174
- Klinck v. Colby* (46 N. Y. 427), distinguished. *Cruikshank v. Gordon.* 184
- Doe v. Roe* (32 Hun, 628), distinguished. *Cruikshank v. Gordon.* 186
- Kelly v. M. R. Co.* (112 N. Y. 443), distinguished. *Miller v. O. S. S. Co.* 211
- In re Ladue* (22 J. & S. 528), reversed. *In re Ladue.* 213
- Mott v. Mott* (68 N. Y. 246), distinguished. *In re Ladue.* 222
- Webb v. R., W. & O. R. R. Co.* (49 N. Y. 420), distinguished. *Read v. Nichols.* 229
- Pollett v. Long* (56 N. Y. 200), distinguished. *Read v. Nichols.* 229
- Lowery v. M. R. Co.* (99 N. Y. 158), distinguished. *Read v. Nichols.* 229
- F. C. Co. v. Metzger* (43 Hun, 71), reversed. *F. C. Co. v. Metzger.* 260
- N. Y. L. I. Co. v. Chapman* (22 J. & S. 297), reversed. *N. Y. L. I. Co. v. Chapman.* 288
- Wemple v. Hildreth* (10 Daly, 481), distinguished. *N. Y. L. I. Co. v. Chapman.* 292
- Vail v. Reynolds* (42 Hun, 647), reversed. *Vail v. Reynolds.* 297
- Uransky v. D. D., etc., R. R. Co.* (44 Hun, 119), reversed. *Uransky v. D. D., E. B. & B. R. R. Co.* 304
- Hartell v. Holland* (19 Wkly. Dig. 312), distinguished. *Uransky v. D. D., E. B. & B. R. R. Co.* 308
- Ehrgott v. Mayer, etc.* (96 N. Y. 275), distinguished. *Uransky v. D. D., E. B. & B. R. R. Co.* 308
- Schuyler v. Leggett* (2 Cow. 668), distinguished. *Coudert et al. v. Cohn.* 312
- People v. Rickert* (8 Cow. 230), distinguished. *Coudert v. Cohn.* 312
- Doe v. Bell* (5 D. & E. 471), distinguished. *Coudert v. Cohn.* 312
- Riggs v. Purcell* (66 N. Y. 193), distinguished. *Wetmore v. Bruce.* 323
- Jackson Co. v. B. M. Ins. Co.* (139 Mass. 508), distinguished. *Fayerweather v. P. Ins. Co.* 328
- Inman v. S. C. R. Co.* (129 U. S. 128), distinguished. *Fayerweather v. P. Ins. Co.* 328
- Watkins v. Maule* (2 J. & W. 249), distinguished. *G. N. Bank v. Bingham.* 356
- Hughes v. Nelson* (29 N. J. Eq. 547), distinguished and questioned. *G. N. Bank v. Bingham* 356
- Freund v. J. & T. N. Bk.* (76 N. Y. 352), distinguished. *G. N. Bank v. Bingham* 357
- Lynch v. F. U. Bk.* (107 N. Y. 183), distinguished. *G. N. Bank v. Bingham.* 357
- Schenck v. Andrews* (57 N. Y. 133), distinguished. *Huntington v. Att-rill* 376
- Boynton v. Andrews* (63 N. Y. 93), distinguished. *Huntington v. Att-rill* 376
- Douglass v. Ireland* (73 N. Y. 100), distinguished. *Huntington v. Att-rill* 376
- Pier v. Hanmore* (86 N. Y. 95), distinguished. *Huntington v. Att-rill et al.* 376
- Bonnell v. Griswold* (89 N. Y. 122), distinguished. *Huntington v. Att-rill* 376
- Sutherland v. Bradner* (116 N. Y. 410), distinguished. *Hooper v. Baillie* 419
- Dey v. Nason* (100 N. Y. 166), distinguished. *Northridge v. Moore.* 423

Van Wycklen v. City of Brooklyn (41 Hun, 418), reversed. *Van Wycklen v. City of Brooklyn.* 424

Comm. v. Choate (105 Mass. 456), distinguished. *Van Wycklen v. City of Brooklyn.* 433

Buffum v. Harris (5 R. I. 243), distinguished. *Van Wycklen v. City of Brooklyn.* 433

Detweiler v. Groff (10 Penn. St. 377), distinguished. *Van Wycklen v. City of Brooklyn.* 433

Phillips v. Terry (3 Abb. Ct. App. Dec. 607), distinguished. *Van Wycklen v. City of Brooklyn* 433

Martin v. Rector (43 Hun, 371), reversed. *Martin v. Rector* 476

Soldiers' Home v. Shaffer (63 Ill. 243), distinguished. *Douglass v. M. Ins. Co.* 487

Martino v. C. F. Ins. Co. (15 J. & S. 520), distinguished. *Douglass v. M. Ins. Co.* 487

N. Y. S. M. M. P. Co. v. Remington (109 N. Y. 143), distinguished. *Beeman v. Banta.* 540

Van Cleef v. Burns (43 Hun 461), reversed. *Van Cleef v. Burns.* 549

Putnam v. B. & S. A. R. R. Co. (55 N. Y. 108), distinguished. *Lehr v. S. & H. P. R. R. Co.* 562

Beck v. Carter (68 N. Y. 283), distinguished. *Murphy v. City of Brooklyn* 578

E. N. Bk. v. Kaufmann (93 N. Y. 273), distinguished. *Barney v. Forbes.* 585

Speyers v. Lambert (1 Sweeny 335; 6 Abb. Pr. U. S. 309; 37 How. Pr. 315), stated as overruled. *Barney v. Forbes.* 585

Baumann v. Pinckney (14 Daly 241), reversed. *Baumann v. Pinckney.* 604

Smith v. L. I. R. R. Co. (102 N. Y. 190), distinguished. *Mather v. F. M. Co.* 631

Trustees, etc., v. Strong (60 N. Y. 56), distinguished. *Trustees, etc., v. Smith.* 639

Hand v. Newton (92 N. Y. 88), distinguished. *Trustees etc., v. Smith.* 639

CAUSE OF ACTION.

1. When a bank has been induced to certify a check by fraudulent representations on the part of the drawer and the check has been transferred without indorsement, an action is not maintainable on its part to recover possession of the check. *G. N. Bank v. Bingham.* 349

2. The cashier of the appellant was induced by the false representations of B. to cash a draft drawn by him, place the proceeds to his credit and certify the check of B., payable to his own order. B. presented the certified check, unindorsed, to respondents, who cashed the same. While they held the check unindorsed the appellant notified them of the fraud and demanded its return, and, they refusing, commenced an action to recover its possession. The respondents subsequently obtained the indorsement of B., and payment having been refused, brought an action to recover the amount. *Held*, that neither action was maintainable. *Id.*

See INTERPLEADER.

CEMETERY ASSOCIATIONS.

As the right to make assessments upon the lands of cemetery associations in the city of Buffalo, is provided for by the local laws applicable to that city alone (Chap. 519, Laws of 1870; Chap. 154, Laws of 1871), which authorize an assessment upon such lands for grading an adjoining street, *held*, that those provisions were not repealed by the act of 1879 (Chap. 310, Laws of 1879), which declares that no land actually used for cemetery purposes shall be sold under execution for any tax or assessment; and that such an as.

essment was valid. *B. C. Association v. City of Buffalo.* 61

CODES.

See CODE OF CIVIL PROCEDURE.
CODE OF PROCEDURE.
PENAL CODE.

CODE OF CIVIL PROCEDURE.

585.	<i>Cruikshank v. Gordon.</i>	179
575.	<i>Haberstro v. Bedford.</i>	187
829.	<i>Holcomb v. Campbell</i>	46
834.	<i>Alberti v. N. Y., L. E. &</i>	
836.	<i>W. R. R. Co.</i>	77
992.	<i>Hooper v. Baillie.</i>	414
993.	<i>Halpin v. P. Ins. Co.</i>	165
	<i>Hooper v. Baillie.</i>	414
1339.	<i>Covenhoven v. Ball.</i>	231
1504.	<i>Martin v. Rector.</i>	476
1505.	<i>Kursheedt v. U. D. S.</i>	
1670.	<i>Institution.</i>	358
1671.	<i>Van Cleef v. Burns.</i>	549
1756.	<i>People ex rel. v. M. M.</i>	
1760.	<i>P. Union.</i>	101
2088.		

CODE OF PROCEDURE.

187.	<i>Haberstro v. Bedford.</i>	187
123.	<i>Kursheedt v. U. D. S.</i>	
132.	<i>Institution.</i>	358

COMMISSIONERS OF HIGHWAYS.

1. In an action brought by the commissioner of highways of the town of H. against the commissioners of highways of the towns of W. C. and C. to recover back moneys, alleged to have been paid by plaintiff in repairing a bridge between said towns, in excess of the proportion of the plaintiff's town, it appeared that the stream crossed by the bridge divided the town of H. from the towns of W. C. and C., and that the commissioners of the three towns worked together in making the repairs; it was understood that plaintiff was to pay one-half of the expense and the commissioner of the other two towns each one-fourth; after the repairs were completed, the three

commissioners accounted with each other and a final adjustment of accounts was had on the basis above stated; they respectively submitted their accounts for audit and upon their being audited, each commissioner was reimbursed by taxes collected from his town. *Held*, that conceding each town should have paid one-third of the expense, the error on the part of the plaintiff was one of law and not of fact, and the overpayment made by him could not be recovered back; that when plaintiff exceeded the proportion of the expense with which he was authorized to burden his town, his act was individual and not official and the rule as to voluntary payments applied; that the town could not by subsequently reimbursing him alter or affect the legal status of the parties as it existed prior to such reimbursement. *Flynn v. Hurd.* 19

2. The duty to repair does not alone in such case authorize the making of the repairs by the commissioners of one of two towns jointly liable and the maintenance of an action against the commissioner of the other town to recover its proportion; it must appear that notice was given as prescribed by statute (§ 3, chap. 225, Laws of 1841, as amended by chap. 383, Laws of 1857), and that the commissioner notified did not within the time prescribed consent or did not unite in making the repairs. *Id.*

COMMON CARRIERS.

1. Plaintiff shipped certain goods, by defendant's road, to be transported from B. to A., consigned to herself. By the bill of lading it was provided that upon the arrival of the goods at the place of destination, and when "placed upon the platform or in the store-room of the company * * * awaiting delivery there to the consignee * * * or to be taken from the car by the consignee," the goods shall be held by defendant "under the liability of a ware houseman and not as a carrier. *Held*, that under the bill of lading defendant had the option on arrival

of the goods to retain them in the car, or to place them in the house, and in either case as a common carrier, after the consignee has had a reasonable time to call and move them. *Draper v. D. & H. C. Co.*

2. Plaintiff did not reside in the place where the goods were stored; she was not there when the goods arrived; some days after, she called at the defendant's house in that place and informed that they had already been unloaded; he expressed regret at the unloading, contemplated their removal to the place and asked to have them stored for a few days, the freight agent assented, the goods had not in fact been unloaded, but were in a car near the freight depot; they left in the car for about ten days thereafter, when they were destroyed by fire. In an action to recover for the loss, whether the goods were held by the bill of lading or under an arrangement made by the freight agent, in either case defendant is liable as warehouseman or common carrier; that as warehouseman he was liable only in case of negligence on its part, causing the fire or in the care of the goods; that the fire commenced; that on this question the burden of proof was upon plaintiff; and that her evidence failed to show negligence, she was properly not allowed to recover.
8. In an action against defendant as common carrier of passengers to recover damages received by plaintiff, while a passenger upon one of its boats, it appeared that injuries were caused by the use of an apparatus wholly under the control of the defendant, furnished and used by it to secure in place a net used in turning the vessel before landing, at a point where there was danger of serious injury to passengers if the apparatus was not properly managed; that the way and the hawser recoiled and that defendant's duty to the passengers was such as to require under the circumstances, more than ordinary diligence for their protection; that the giving

ment or do any act whereby this right of action against the carrier for losing or injuring the leather should be released or cut off. *Held*, that the provisions in the bill of lading cut off the insurer's rights to be subrogated to the rights and remedies of the owner against the defaulting carrier, and that thereby plaintiffs' right to recover upon the policy was defeated. *Flyerweather v. P. Ins. Co.* 324

See RAILROAD CORPORATIONS.
STEAMSHIP COMPANIES.

CONDITIONS.

1. The ground upon which the title of a grantee may be defeated and a claim of forfeiture supported, as for breach of condition subsequent, must be substantial and clearly established. *Rose v. Hawley*. 502
2. *It seems* that a grantor of property for a specified public use, may subject the title to liability of forfeiture for breach of a condition expressed in his deed. *Id.*

See DEED.

CONFLICT OF LAW.

1. A decree dissolving a marriage for a cause not regarded as adequate by the laws of this state, rendered in another state by a court having jurisdiction of the subject and the parties, in an action brought by the husband, will not deprive the wife of her then existing dower rights in lands in this state; at least, in the absence of evidence that, under the laws of the state where it was rendered, it has that effect. *Van Cleaf v. Burns*. 549
2. As to whether, even with such evidence, it will have the same effect in this state, *quere*. *Id.*

CONTRACTS.

1. A husband and wife agreed to live separately, and to effectuate that

agreement entered into articles of separation, through the medium of a trustee, by the terms of which the husband agreed to pay to the trustee, annually a sum named, for the support of the wife during life, the same to be in full satisfaction for such support and maintenance and of all alimony; the wife and trustee covenanted to save the husband harmless from his obligation to support her, and upon execution of the agreement the parties separated. In an action against the husband, to recover a payment under the agreement, *held*, that it was valid; that the trustee named was the trustee of an express trust, and that the action was properly brought in his name; also, *held* (FOLLETT, Ch. J., dissenting), that the agreement was not abrogated by a subsequent divorce of the parties, at least when no provision for alimony was made in the decree of divorce. *Clark v. Fordick*. 7

2. The parties entered into a contract in writing, by the terms of which defendants sold to plaintiff a stock of patterns for \$500 and agreed to sell her such patterns as she should order during the ensuing year at prices specified; she agreeing to keep on hand a full assortment of all patterns made by defendants. Defendants also agreed that during the continuance of the contract they would take back old and undesirable patterns and give others in exchange. The contract by its terms was to continue for the term of one year from date, "or longer, with the right of transfer, if mutually agreeable." After the expiration of the year plaintiff desiring to discontinue the business, asked defendants to take back all unsold patterns and refund the price she had paid, about \$488, and on defendants' refusal brought this action to recover the same, alleging that contemporaneously with said contract, an oral agreement was made to the effect that if at the end of the year, or at any other time, plaintiff should be dissatisfied and wish to discontinue the business, defendants would, upon notice, relieve her of the agency by taking back the patterns remaining in her hands and

refunding the money paid. On the trial plaintiff was permitted to prove the oral agreement. *Held*, error; as such agreement was in conflict with the terms of the written contract, and nullified its provisions. *Gordon v. Niemann*. 152

8. Also, *held*, that the oral agreement was void under the statute of frauds, as by its terms it was not to be performed within a year. *Id*.

4. Plaintiff entered into a contract with defendant, by which he sold to him the exclusive right to give performances of certain plays for thirty consecutive weeks. Defendant agreed to pay plaintiff \$200 each week "commencing the first Saturday after said performance begins." In an action to recover an alleged balance due under said contract it was admitted that the performance began as contemplated by the contract. Defendant claimed that the condition of the contract was that he should produce the plays each week and that without proof that he had so done, plaintiff could not recover. *Held*, untenable; that after the commencement of the performance, if defendant neglected or refused to produce the plays, it was a breach of the contract on his part, and did not shield him from his obligation to pay the stipulated price for each week until the end of the time specified. *Daly v. Stetson*. 269

5. Defendant set up as a counter-claim a right, as assignee of N., to royalties on a certain play performed by plaintiff. It appeared that a contract was entered into between N. and A., a dramatic author, by which A. assigned to N. for his theatre in New York the exclusive right of performance of all plays, dramas and comedies theretofore or thereafter written by A.; also "all property rights on all these plays for the United States," so that N. "exclusively has the right to give to other stages * * * the permission to perform said plays, to fix and determine the royalties for the same and collect said royalties from the other managers, and * * * to act as the sole proprietor of the same," N. to pay a certain royalty

for each performance of these plays at his own theatre and one-half of all the royalties received by him "by disposing of his property right to these plays to the other theatres." An annual accounting was provided for. The contract was to continue two years and after that from year to year unless revoked by one of the parties. In 1881 N., describing himself as an agent of A., entered into a contract with plaintiff, giving him the right to adapt the plays of A., for performances in English, plaintiff to pay to N., as such agent, specified royalties. It also appeared that the two years had expired, and N. had been notified of the revocation of the contract by A., prior to the adaptation by plaintiff of the plays, the royalties claimed for which N. assigned to defendant and which constituted the counter-claim, and plaintiff had procured his rights to that play directly from A. *Held*, that under the contract with A., N. was an agent merely; that he acquired thereunder no title to said plays and upon notice of revocation being given as provided, his agency ceased; and therefore the counter-claim was not sustained. *Id*.

6. Plaintiff, on January 1, 1857, entered defendant's service as secretary, at a yearly salary. He continued in such service until January 19, 1885, when he was, by defendant's board of directors, removed, and a successor *pro tem*. appointed. In an action to recover as damages the salary for the remainder of that year, there was no evidence that the original hiring was for a year other than the fact that plaintiff's salary was annual. One of defendant's by-laws which went into effect in 1850 provided that its officers, including the secretary, "shall respectively hold their offices during the pleasure of the board of directors, and until the appointment of a successor, either permanently or *pro tem*." *Held*, that the action was not maintainable; that plaintiff was chargeable with notice of the by-law, and as no special contract which indicated any purpose to abridge the right of removal given by it was shown, it entered into and became

part of the contract of employment; and that under the by-law the right of removal at any time was unqualified. *Douglas v. M. Ins. Co.* 484

See BILL OF LADING.
GUARANTY.
INSURANCE (FIRE).
INSURANCE (LIFE).
INSURANCE (MARINE).
LEASE.
PRINCIPAL AND AGENT.
REFORMATION OF CONTRACT.
SALES.
STATUTE OF FRAUDS.
WARRANTY.

CONVERSION.

In an action for the alleged conversion of certain goods plaintiff claimed under a chattel mortgage from T., the former owner. Defendant took possession under a subsequent bill of sale from T., the stipulated purchase-price having, in pursuance of the contract of sale, been credited upon an indebtedness of T. Plaintiff's mortgage had not, at the time, been filed, and defendant had no knowledge or notice thereof. Defendant offered to prove that the mortgage was fraudulent, which, on objection, was excluded. *Held, error. Button v. Rathbone.* 666

CORPORATIONS.

1. Plaintiff, on January 1, 1857, entered defendant's service as secretary, at a yearly salary. He continued in such service until January 19, 1885, when he was, by defendant's board of directors, removed, and a successor *pro tem.* appointed. In an action to recover as damages the salary for the remainder of that year, there was no evidence that the original hiring was for a year other than the fact that plaintiff's salary was annual. One of defendant's by-laws which went into effect in 1850 provided that its officers, including the secretary, "shall respectively hold their offices during the pleasure of the board of directors, and until the appointment of a successor, either permanently or *pro tem.*" *Held,*

that the action was not maintainable; that plaintiff was chargeable with notice of the by-law, and as no special contract which indicated any purpose to abridge the right of removal given by it was shown, it entered into and became part of the contract of employment; and that under the by-law the right of removal at any time was unqualified. *Douglas v. M. Ins. Co.* 484

2. Where a stockholder of a corporation becomes an officer thereof, assumes the duties of the office and performs them without any agreement or provision for compensation, the presumption, in view of his relation and interest, may properly arise that he intends to perform the services gratuitously. *Mather v. E. M. Co.* 629

3. In an action to recover for services as treasurer of a corporation it appeared that plaintiff was a stockholder of the corporation and was a member of a banking firm, the other member of which was also a stockholder and trustee which firm it was understood should have the banking business of the corporation. It also appeared that a by-law of defendant empowered its board of trustees to fix the compensation of its officers, and while that of the secretary was so fixed no compensation was designated or provided for the treasurer. *Held,* the evidence warranted the finding that there was no agreement express or implied to support plaintiff's claim and that the action was not maintainable. *Id.*

See BUSINESS CORPORATIONS.

INSURANCE (FIRE).
INSURANCE (LIFE).
INSURANCE (MARINE).
MUNICIPAL CORPORATIONS.
MUTUAL BENEFIT ASSOCIATIONS.
RAILROAD CORPORATIONS.
STEAMSHIP COMPANIES.

COUNTER-CLAIM.

1. In an action to recover the last quarter of rent reserved by a lease for one year of a furnished dwelling-house, the answer set up as a

counter-claim damages : have been sustained on of the breach of an implant that said house was mediate and permanent tion. The referee found ing the term of the leases and strong, unheatable odors exist ly and in large quantities out the house, making sick and rendering the healthy and unfit for huna tion. That said gases, or did not arise in or from of said house, but came joining premises. That party knew of their existence the lease was executed. not claimed that there deceit or false representation plaintiff as to the condition house or its fitness for the for which it was let. It that defendant thoroughly ained the premises before the lease, and neither occupy nor attempted to until the last quarter of t. *Held*, that defendant's claim was not tenable; fact that personal property part the subject of the i not affect the question. *I v. Brown*.

2. In 1872, one W. recovered ment in South Carolina against plaintiff in this action of w defendant herein was the ficial owner, although he the legal title. In August ing, W. brought an action state upon the judgment. tiff, by his answer therein, that no process was served him in the South Carolina and he neither appeared authorized an appearance behalf. Under a compromise ment plaintiff paid defendant and the latter gave his bond conditioned to indemnify plaintiff harmless against all set forth in the complaint action and against all costs damages plaintiff may be pelled to pay, by reason action, or the claims upon the same is based. The leg to the South Carolina judge was afterwards assigned to defendant, who brought an action

contracts for putting on plaintiff's patent roofing within certain territory, defendant to have the exclusive right to do the work, he paying plaintiff an agreed price for the material; that aided and assisted by defendant, who contributed both time and money, plaintiff procured a contract to put the roofing on certain buildings, it being expressly agreed that defendant was to do the work; that he proceeded to make the necessary arrangements to fulfill the contract, including the purchase of certain materials plaintiff did not furnish; that he was only permitted to do a portion of the work, and plaintiff did the balance and retained the money paid therefor. Evidence was given on the part of defendant sustaining the allegations of the answer with the proviso that the agreement was to last during the pleasure of plaintiff. *Held*, that the counter-claim was properly allowed; that the contract was not within the Statute of Frauds; that the establishment of the counter-claim did not depend upon whether, under the original agreement, defendant was exclusively entitled to do the work, as his agency was adopted in, and extended to, the transaction in question; that the right reserved by plaintiff to terminate the agreement at its pleasure was subject to the requirements of good faith, and could not be exercised after the contract for the roofing had been obtained, as to that contract, so as to deprive the agent of his profits. *W. C. & M. Co. v. Holbrook.* 586

— *When in action for specific performance of contract for sale of lands defendant entitled to recover as damages by way of counter-claim, auctioneer's fees on sale and expenses for examining title.*

See Wetmore v. Bruce.

319

COVENANTS.

1. The law will not imply a covenant in a lease as to conditions not under the control of the lessor; and with reference to which he and the lessee being ignorant,

neither could be supposed to have contracted. *Franklin v. Brown.* 110

2. Adjoining owners of land may by grant impose mutual and corresponding restrictions upon the lands belonging to each, for the purpose of securing uniformity in position of the buildings. The covenants being mutual, and imposing such restriction in perpetuity, are in effect reciprocal easements, the right to the enjoyment of which passes as appurtenant to the premises and will be enforced by a court of equity. Such a covenant, therefore, creates an incumbrance.

Wetmore v. Bruce

319

3. An indenture executed in 1808 which contained a grant of land, reserving a perpetual annual rent, after a covenant on the part of the grantees to pay the rent reserved and various other covenants on their part, contained a condition that if the rent should be unpaid for twenty-eight days after the day of payment specified, it should be lawful for the grantor, his heirs and assigns to enter and distrain, etc.; then followed this condition: "Should it at any time happen that no sufficient distress can be found upon the premises to satisfy such rent due and in arrear as aforesaid, or if either of the covenants and conditions hereinbefore contained * * * shall not be performed * * * or shall be broken * * * it shall be lawful for the grantor, his heirs and assigns to re-enter." In an action under the Code of Civil Procedure (§ 1504) to recover the premises on the ground that six months or more rent was in arrear, *held*, that the right to re-enter for non-payment of rent was not limited to the case of default of sufficient distress; but that the general condition authorizing a re-entry in case of a breach of either of the covenants applied to the covenant to pay rent; and that, therefore, to maintain the action it was not necessary to show that before its commencement the fifteen days' notice in lieu of a distress for rent required by the provision (§ 1505) before the

bringing of an action of ejectment, where a right of re-entry is reserved in default of a sufficient distress, was given. *Martin v. Rector*. 476

See DEED.

CREDITOR'S SUIT.

—In an action by firm creditors to set aside assignment, for benefit of creditors, of firm property, executed by one of the co-partners, the burden of proof is upon plaintiffs to establish that it was executed without assent of the other parties.

See *Hooper v. Baillie*.

413

DAMAGES.

1. In proceedings *Ly mandamus*, to compel a restoration of the relator to membership in defendant's organization on the ground that he had been unlawfully expelled, it appeared that by reason of his non-membership, after expulsion, the relator was discharged from the service in which he was engaged. *Held*, that this was the proximate result of the cause of which he complained, and as such furnished a ground for the award of damages, and that the conclusion of the trial court, as to the amount, was not reviewable here. *People ex rel. v. M. M. P. Union*. 101
2. In an action to recover damages for injuries sustained by plaintiff, a married woman, alleged to have been caused by defendant's negligence, the complaint contained no averment showing that she was for any reason entitled to the fruits of her labor, or that she was engaged in business on her own account and by reason of her injuries has suffered loss therein. Plaintiff was permitted to prove on trial, under objection and exception, that she was engaged in business from which she received a certain amount per month and that because of her injuries she was prevented from working two months. *Held*, error. *Uransky v. D. D., E. B. & B. R. R. Co.* 304
3. Presumptively, damages for negligently diminishing the earning capacity of a married woman belong to her husband, and when she seeks to recover such damages, her complaint must allege that for some reason she is entitled to the fruits of her own labor, or, if she seeks to recover damages for an injury to her business, she must allege that she was engaged in business on her own account and by reason of the injury was injured therein as specifically set forth. *Id.*
4. It seems it is only where the vendor in a contract for the sale and conveyance of land is chargeable with bad faith that the vendee is entitled, upon breach of the covenant to convey, to recover damages measured by the goodness of his bargain or the financial benefit which would have resulted from performance. *Northridge v. Moore*. 419
5. The vendee, however, may recover back purchase-money paid by him and such expenses as he has reasonably incurred in examination of the title. *Id.*
6. The parties entered into a contract by which defendant agreed to convey to plaintiff certain real estate. It was known by plaintiff that defendant at the time had no title to the property; the latter contracted in good faith, relying upon a contract on the part of another to convey the premises to him, and both parties believed that defendant would acquire title before the time stipulated for the conveyance. Defendant was unable to perform by reason of the failure of the party who had agreed to convey to him to fulfill his contract. In an action to recover damages plaintiff recovered the expenses incurred in examining the title, with interest. *Held*, no error; that, although plaintiff was aware at the time of making the contract that defendant did not have the title, yet as both parties supposed he would obtain it, the reasonable expense of examining such title might be regarded as in the contemplation of the parties. *Id.*
7. Defendant contracted to construct a refrigerator for plaintiff, who

was engaged in the business of preparing poultry for market, and with knowledge that plaintiff intended to at once make use of the refrigerator for freezing and preserving chickens for the May market following, expressly warranted that the freezer would keep them in perfect condition; this it failed to do, and in consequence a large quantity of chickens were lost. In an action upon the warranty, the court charged in substance, that plaintiff was entitled to recover as damages the difference between the value of the refrigerator as constructed and its value as it would have been if made according to contract, and also to recover the market value of the chickens lost, less cost of getting them to market and fees of commission men charged on sale. *Held*, no error. *Beeman v. Banta*. 538

8. Where brokers who had sold wheat short for a customer on a margin bought in without authority on his account, and he, on being advised thereof, repudiated the purchase and subsequently directed the brokers to purchase for him at a price specified, which they refused to do, and it appeared that wheat could have been purchased in the market for several days after the order at the price named, *held*, that plaintiff's damages were the amount defendants would have been indebted to him, had they made the purchase as directed; that for the purpose of the remedy plaintiff's position was not affected by the unauthorized purchase; that the breach of contract was in the refusal of defendants to purchase when and as instructed, and this fixed the measure of damages. *Campbell v. Wright*. 594

9. The distinction between such case and one of a purchase by a broker for his customer on a margin pointed out. *Id.*

10. The provisions of the Rapid Transit Act (§ 20, chap. 606, Laws of 1875) and the General Railroad Act (Chap. 140, Laws of 1850) declaring that commissioners of appraisal shall not, in determining

the amount of compensation to be made to parties owning or interested in property acquired for the construction and operation of railways by corporations organized under them "make any allowance or deduction on account of any real or supposed benefits which the party in interest may derive from the construction of the proposed railroad," apply simply to the land actually taken. Whatever land is taken must be paid for at its full market value, with no deduction, although the remainder of the land owner's property may be largely enhanced in value by the operation of the railroad. *Newman v. M. E. R. Co.* 619

11. In considering, however, the question of damages to the remainder the commissioners must consider the effect of the road upon the whole of that remainder, its advantages and disadvantages, benefits and injuries, and if the result is beneficial there is no damage and nothing can be awarded. *Id.*

12. While the easements, which the owners of land abutting upon public streets have therein, are interests in real estate and constitute property, in estimating their value when taken by a railroad company under said acts, they cannot be considered as property separate and distinct from the land to which they are appurtenant, and the right of the property owner to compensation is measured, not by the value of the easements separate from his land, but by the damages which the land sustains because of the loss of the easements. *Id.*

13. In estimating the damages, therefore, for the taking away or interfering with such easements, the benefits the abutting property receives from the operations of the railroad are to be taken into consideration as well as the loss or damage because of the interference with the easements. *Id.*

— *In action to recover damages, alleged to have been sustained by reason*

*of false representations indu-
chase of personal property, the
of damages is, the difference
between article sold and what
be, if as represented.*

See Vail v. Reynolds.

— *When in action for spe-
formance of contract for sale
defendant entitled to recover
ages, by way of counter-claim,
eer's fees on sale and expenses
examining title.*

See Wetmore v. Bruce.

— *When loss of prospect is
proper as damages.*

See W. C. & M. Co. v. L.

DEBTOR AND CREDIT

See CREDITOR'S SUIT.

DECEIT

See FRAUD.

DEED.

1. Where an owner of a tract conveys a portion thereof which bounds the land on by a street, described as being upon a map, and provides shall actually be laid out of width within a given time, the presumption is, the conveyance carries the fee to the center of the street. *In re Landre.*
2. As between grantor and grantee, a street is created when the location is clearly defined as to extent and location is devoted to that use by the grant, although it is then in condition to be used as a street.
3. In such case it may with propriety be referred to in the deed as a contemplated street; the reference is to physical condition, not to use.
4. In 1795, one S., being the owner of a large tract of land situated in the city of New York, executed a deed of a small portion of the land lying in the center of the tract. The land conveyed was de-

village was not then, but was afterward incorporated, and subsequently was incorporated as a city, and vested with the rights of property of the town. (Chap. 331, Laws of 1855; chap. 866, Laws of 1872.) In an action of ejectment based on the ground of a breach of said conditions, evidence was given tending to show that the premises in question were, at the time of the conveyance, bounded by a building, which was afterward taken down and a new one erected, the wall of which encroached about sixteen inches upon said premises; the location of the line however was in dispute, and there was other evidence to the effect that there was no encroachment, and if any in fact existed, it did not appear it was with defendant's knowledge. It also appeared that an area on the south side of said building further encroached about six feet upon said premises; that said area was covered by a sidewalk in which was a grating and a door covering a stairway, which, when open, is an obstruction, but when closed is, with the grating, flush with the sidewalk. It did not appear that the door had, by being left open, been an obstruction. *Held*, that while the purpose of the conditions was to preserve the use of the premises for a street or public highway, and anything erected upon them inconsistent with that use would be a violation thereof, it could not be assumed that what is usually or commonly permitted or required in streets of villages and cities came within the prohibition, and the construction of the area was not an erection upon the land within the meaning of the conditions, nor was it rendered so by use. *Rome v. Hawley* 502

See COVENANT.

RECORDING DEEDS.

REFORMATION OF CONTRACT.

DEFENSES.

Plaintiff indorsed certain promissory notes for the accommodation of the maker, which were discounted by defendant, certain railroad

bonds being pledged as collateral. Before the maturity of the notes, plaintiff consented that other first mortgage railroad bonds might be substituted for those pledged. The notes were transferred by defendant, and were taken up by him upon the promise of plaintiff to give his own notes therefor; he having failed so to do, defendant brought suit upon the promise. Plaintiff set up as a defense therein a misappropriation of the bonds pledged, based upon the fact that defendant accepted in lieu thereof second instead of first mortgage bonds as agreed. This defense was ruled out on the objection of defendant, and he recovered judgment. In this action, brought to recover damages for the misappropriation, *held*, that the former judgment was not a bar, as the cause of action here was unavailable as a defense in the former action, and was not pleaded or presented as a counter-claim.

De Graaf v. Wyckoff.

1

DEFINITIONS.

1. To constitute occupancy of a building used for manufacturing purposes there must be some practical use or employment of the property; its use as a place of storage merely is not sufficient. *Hulpin v. P. Ins. Co.* 165
2. The "fair value" contemplated by the provisions of the act of 1875 (§ 14, chap. 611, Laws of 1875), prohibiting the issuing of stock, of a corporation organized under it, for property, except for "property actually received for the use and legitimate purpose of said corporation, at its fair value" is that which the property has at the time of the sale; it is not dependent upon the subsequent success or failure of the investment, further than that result may have been legitimately within evidential contemplation at the time of the sale, in view of the uses for which it may have had available advantages within itself. *Huntington v. Attrill.* 365
3. The word "misconduct," in the provision of the Revised Statutes (1 R. S. 740, § 1), declaring that "in

case of divorce dissolving marriage contract for the misconduct of the wife, she shall not be dowered," refers, not to the misconduct which may be termed misconduct or converted into a cause of action by the legislature of the state, but only to that kind of misconduct which our laws regard as sufficient to authorize a divorce, that is, adultery. *Van Cleaf v. Burns*.

DEMAND.

— In action to recover on certain United States bonds, which have been loaned by plaintiff to defendants' firm, defendants gave notice tending to show a demand by one of the defendants for the bonds made more than six years before brought and requested the court to charge that if such a demand was refused, plaintiff could not recover. *Held*, error; demand of one partner was equivalent to a demand of all, and if no action was barred by the Statute of Limitations. *Northrop v. (Mem.)*.

DIVORCE.

1. A decree dissolving a marriage in a cause not regarded as adequate under the laws of this state, rendered in another state by a court having jurisdiction of the subject and parties, in an action brought by the husband, will not deprive the wife of her then existing dower in lands in this state; at least in the absence of evidence that the laws of the state where rendered, it has that effect. *Van Cleaf v. Burns*.
2. As to whether, even with such evidence, it will have the same effect in this state, *quære*.
3. The word "misconduct," in the provision of the Revised Statutes (1 R. S. 740, § 1), declaring that "in case of divorce dissolving marriage contract for the misconduct of the wife she shall not be dowered," refers, not to any misconduct which may be termed misconduct or converted into a cause of action by the legislature of any

but only to that kind of misconduct which our laws recognize as sufficient to authorize a divorce—that is, adultery. *Id.*

5. *It seems*, the provisions of the Code of Civil Procedure (§§ 1756, 1760), providing that where judgment is rendered, at the suit of the husband, dissolving the marriage, the wife shall not be entitled to dower, were substituted for the provisions of the Revised Statutes (2 R. S. 146, § 48) declaring that "a wife being a defendant in a suit for a divorce brought by her husband, and convicted of adultery, shall not be entitled to dower," and the repeal of the latter provision (§ 1, subd. 4, chap. 245, Laws of 1880) left the law unchanged. *Id.*

EASEMENTS.

1. A right in the nature of an easement cannot be created by a parol agreement for the partition of lands. *Taylor v. Millard*. 244
2. Adjoining owners of land may by grant impose mutual and corresponding restrictions upon the lands belonging to each for the purpose of securing uniformity in position of the buildings. The covenants being mutual, and imposing such restrictions in perpetuity, are in effect reciprocal easements, the right to the enjoyment of which passes as appurtenant to the premises and will be enforced by a court of equity. *Wetmore v. Bruce*. 319
3. While the easements, which the owners of land abutting upon public streets have therein, are interests in real estate and constitute property, in estimating their value when taken by a railroad company under the General Railroad Acts, they cannot be considered as property separate and distinct from the land to which they are appurtenant, and the right of the property owner to compensation is measured, not by the value of the easements separate from his land, but by the damages which the land sustains because of the loss of the easements. *Newman v. M. E. R. Co.* 618
4. In estimating the damages, therefore, for the taking away or interfering with such easements, the benefits the abutting property receives from the operations of the railroad are to be taken into consideration as well as the loss or damage because of the interference with the easements. *Id.*

EJECTMENT.

1. In an action to recover possession of certain real estate in the city of New York, it appeared that the premises in question were part of a farm owned by B. in his lifetime. The earliest deed produced by plaintiff was one executed in 1835 to S., the grantor in which, was described as the only child and heir-at-law of B.; the truth of this recital was established by the evidence. As early as 1825 said farm was occupied by McG., a son of said grantor, who cultivated it until 1833, during which time said grantor lived at her homestead in the neighborhood and frequently visited her son at the dwelling-house on the farm, and was in constant communication with him. When his occupation ceased, the farm was rented. *Held*, that possession in said grantor was sufficiently established. *Dunham v. Townshend*. 281
2. It appeared that said premises were conveyed by S. to H. On the trial plaintiff introduced in evidence a deed from the sheriff to one A., which recited the issuing of an execution against H., the seizure and sale by virtue thereof of the premises conveyed, and the redemption of the land by A., the grantee, the holder of a subsequent judgment against H. On the trial at the General Term, this deed was objected to as invalid, because the judgment on which this execution was issued was not produced and read in evidence. On the argument in this court plaintiff produced a certified copy of the judgment-roll. *Held*, that it could be properly received; and its production removed the objection to the sheriff's deed. *Id.*
3. While the production of record evidence is never allowed in an

appellate court for the purpose of reversing a judgment, it is not permitted for the purpose of obtaining one.

4. Plaintiff's title was objected to on the ground that the premises in question were below original high-water mark, and that the lots were therefore, in the city. The surveyor testified that the lots were on the west side of which the lots are located, was graded in 1850 and 1853; that before that time work was commenced here in the locality, and that the question was about thirteen feet below high-water mark. It appeared the city had levied a tax on said lots for assessment on said lots for said year, and disclaimed any ownership in itself. It also appeared that prior to 1835 high-water mark was east of said avenue at that time, and that the meadows which included said lots, were at low tide, and ordinary daily tide, and were covered by water, except on occasional and severe storms. *Held*, that no title in said land was shown in the city, and the question was not as to what high-water mark in 1850, but as to what high-water mark was during the occupancy of McG.
5. Where, in an action of ejectment, the plaintiff establishes title by proper and sufficient conveyance and possession prior to that of the defendant, and that the defendant attempted to be justified in his claim of right, the burden of establishing a better title than that of the plaintiff is cast upon the defendant.
6. An indenture executed by a grantor which contained a grant of land, reserving a perpetual annuity to the grantor after a covenant on the part of the grantees to pay the rent and various other covenants on their part, contained a covenant that if the rent should be due twenty-eight days after the day specified, it should be lawful for the grantor, his heirs and assigns to enter and distrain etc.; then followed this covenant: "Should it at any time happen that no sufficient distress should be found upon the premises to satisfy such rent due and in ar-

premises; the location of the line however was in dispute, and there was other evidence to the fact that there was no encroachment, and if any in fact existed, it did not appear it was with defendant's knowledge. It also appeared that an area on the south side of said building further encroached about six feet upon said premises; that said area was covered by a sidewalk in which was grating and a door covering a stairway, which when open is an obstruction, but when closed is, with the grating, flush with the sidewalk. It did not appear that the door had, by being left open, been an obstruction. *Held*, that while the purpose of the conditions was to preserve the use of the premises for a street or public highway, and anything erected upon them inconsistent with that use would be a violation thereof, it could not be assumed that what is usually or commonly permitted or required in streets of villages and cities came within the prohibition, and the construction of the area was not an erection upon the land within the meaning of the conditions, nor was it rendered so by use. *Rose v. Hawley*. 502

8. It appeared that plaintiff had observed the erection of the building, the wall of which it was claimed encroached on the reserve premises in 1857; that he knew when the wall was rebuilt in 1866, and protested, but never called the attention of defendant's board of trustees to the matter. *Held*, it could not be held as a matter of law that he waived his right to assert by action the alleged breach. *Id.*

EMINENT DOMAIN.

1. The provisions of the Rapid Transit Act (§ 20, chap. 606, Laws of 1875) and the General Railroad Act (Chap. 140, Laws of 1850) declaring that commissioners of appraisal shall not, in determining the amount of compensation to be made to parties owning or interested in property acquired for the construction and operation of railways by corporations organized under them "make any allowance or deduction on account of any real or supposed benefits which the party in interest may derive from the construction of the proposed railroad," apply simply to the land actually taken. Whatever land is taken must be paid for at its full value, with no deduction, although the remainder of the land owner's property may be largely enhanced in value by the operation of the railroad. *Newman v. M. E. R. Co.* 618
2. In considering, however, the question of damages to the remainder the commissioners must consider the effect of the road upon the whole of that remainder, its advantages and disadvantages, benefits and injuries, and if the result is beneficial there is no damage and nothing can be awarded. *Id.*
3. While the easements, which the owners of land abutting upon public streets have therein, are interests in real estate and constitute property, in estimating their value when taken by a railroad company under said acts, they cannot be considered as property separate and distinct from the land to which they are appurtenant, and the right of the property owner to compensation is measured, not by the value of the easements separate from his land, but by the damages which the land sustains because of the loss of the easements. *Id.*
4. In estimating the damages, therefore, for the taking away or interfering with such easements, the benefits the abutting property receives from the operations of the railroad are to be taken into consideration as well as the loss or damage because of the interference with the easements. *Id.*
5. An action to recover damages, to plaintiff's leasehold interest in property abutting upon certain streets in the city of New York because of interference with his easements in said streets by the construction and operation of the M. railway was tried on the assumption that said structure caused a permanent impairment of the easements. By the act of 1872 (§ 3, chap. 585, Laws of 1872)

1. The provisions of the Rapid Transit Act (§ 20, chap. 606, Laws of 1875) and the General Railroad Act (Chap. 140, Laws of 1850) declaring that commissioners of appraisal shall not, in determining the amount of compensation to be made to parties owning or interested in property acquired for the construction and operation of railways by corporations organized under them "make any allowance

the above provisions of the Railroad Act are made as to the G. E. R. R. Co. rights the M. R. Co. has shown. Evidence was given to show that, while the upper the building on the premises been made less desirable purpose for which they were, *i. e.*, as dwellings, by reason of the defendants' structure, and the sequence thereof the premises fallen, the first floor, used as a restaurant, had become more desirable for business purposes greatly enhanced in rental value. The court charged that in estimating the damages to plaintiffs' leasehold interests caused by the defendants' interference with their easements appurtenant to the premises, the jury had not to take into consideration any facts or circumstances which were not in existence at the time the premises were taken into consideration. The court held, error.

ESTOPPEL.

1. Where a certified check is cashed without indorsement by the bank is not estopped by the bank's ratification from questioning the validity of the check. *G. N. v. Bingham*.
2. To constitute an equitable estoppel it is not necessary that the party should be false representation or concealment of material facts that the party sought to be estopped should design to mislead. It is sufficient if his act was voluntary and calculated to mislead, and actually has misled another acting in good faith. *Trustees, v. Smith*.
3. A declaration which might amount to an estoppel at the time it was made, may become such by ratification or acquiescence.
4. If one is induced to purchase lands by the acts or representations of another designed to influence his conduct and creating a reasonable belief on his part that he thereby acquiring a valid title to the same, under which he acquires the party who thus influenced him.

meetings must be construed as a single representation; also, that no distinction was to be made between the upland and the bay. *Id.*

— *When acceptance by wife of provision made for her benefit by her husband's will, will not preclude her from claiming equitable title to real estate, the legal title of which was in him at his death.*

See Hauck v. Weicken.

67

— *When party purchasing property, pendente lite, with knowledge of plaintiff's claim bound by judgment.*

See Horey v. Elliott.

124

EVIDENCE.

1. Neither a mortgagee nor his assignee derives "his title or interest from, through or under" the mortgagor within the meaning of the provision of the Code of Civil Procedure (§ 829) prohibiting a party from being "examined as a witness in his own behalf or interest * * * against * * * a person deriving his title or interest from, through or under a deceased person * * * concerning a personal transaction or communication between the witness and the deceased person." *Holcomb v. Campbell.*

46

2. Where therefore a husband and wife united in a mortgage of land owned by the former, both covenanting to pay the amount secured thereby, and the former died leaving a will by which he devised the lands to his wife, *held*, that the wife was not prohibited by said provision from testifying as against an assignee of the mortgage to certain transactions and agreements between her husband and the mortgagee to the effect that certain accounts found due her husband from the mortgagee on settlements of accounts between them should be applied as payments upon the mortgage. *Id.*

3. Also, *held*, that her testimony as to what was said between her husband and the mortgagor in connection with each transaction, explaining the same, was competent.

Id.

4. In an action to recover damages for personal injuries alleged to have been caused by defendant's negligence, evidence as to the poverty of the plaintiff, *i. e.*, that he was dependent upon his earnings for his support, incompetent, as bearing upon the question of damages. *Alberti v. N. Y., L. E. & W. R. R. Co.*

77

5. Inasmuch, however, as a person so injured is bound to act in good faith and to resort to such means as are reasonably within his reach to cure himself, where defendant has drawn out testimony to show that plaintiff had not had the best medical attendance, care and treatment, it is competent for the latter, for the purpose of showing that he resorted to such means as were reasonably within his reach, to prove the fact of his poverty and dependence upon his earnings, and consequently his inability to procure the best medical attendance.

Id.

6. Upon the trial of such an action, the attorney for the plaintiff has authority to expressly waive, on his behalf, the statutory provision prohibiting a physician from disclosing the information acquired by him while attending upon his patient in his professional capacity. (Code Civ. Pro. §§ 834, 836.)

Id.

7. *It seems* that the calling of the physician as a witness by his patient, is of itself an express waiver of the seal of secrecy imposed by the statute.

Id.

8. *L.*, a medical witness called for plaintiff, was permitted to testify, under objection and exception, to his opinion as to the result of the disease in the natural and ordinary course, to wit, that the plaintiff would never be any better and never be able to straighten his limbs. *Held*, no error.

Id.

9. The witness was then asked to state the length of time plaintiff might live in the natural and ordinary course of events. Upon objection the court decided that the witness might answer if he could speak with reasonable certainty.

He replied he could only give probability from the history of similar cases, and this he was permitted to do under objection and exception. *Held*, no

10. Upon the trial plaintiff's counsel offered in evidence a photograph of plaintiff, showing the manner in which his limbs were contracted, as a result of the accident, proving by a witness that it was taken in his presence and correctly represented the condition of plaintiff's limbs. The photograph was received over objection and exception. *Held*, error; that it was competent evidence on the same principle as a map or diagram.
11. The parties entered into a contract in writing, by the terms of which defendants sold to plaintiff a stock of patterns for \$500, and agreed to sell her such patterns as she should order during the coming year at the prices specified, she agreeing to keep on hand a full assortment of all patterns made by defendants. Defendants also agreed that during the continuance of the contract they would take back old and undesirable patterns and give others in change. The contract by its terms, was to continue for the term of one year from date, "or longer, with the right of transfer, if mutually agreeable." After the expiration of the year plaintiff desired to discontinue the business, and defendant to take back all unused patterns and refund the price she had paid, about \$488, and on defendants' refusal brought an action to recover the same, alleging that contemporaneously with the contract, an oral agreement was made, to the effect that if at the end of the year, or at any other time, plaintiff should be dissatisfied and wish to discontinue the business, defendants would, upon notice, relieve her of the agency, taking back the patterns remaining in her hands and refunding the money paid. On the trial plaintiff was permitted to prove the oral agreement. *Held*, error; as such agreement was in conflict with the terms of the written contract, a

appellate court for the purpose of reversing a judgment, it may be permitted for the purpose of sustaining one. *Id.*

17. In an action to recover damages for injuries sustained by plaintiff, a married woman, alleged to have been caused by defendant's negligence, the complaint contained no averment showing that she was for any reason entitled to the fruits of her labor, or that she was engaged in business on her own account and by reason of her injuries has suffered loss therein. Plaintiff was permitted to prove on trial, under objection and exception, that she was engaged in business from which she received a certain amount per month and that because of her injuries she was prevented from working two months. *Held, error. Cransky v. D. D., E. B. & B. R. Co.* 364
18. In an action against directors of a corporation organized under the act of 1875 (Chap. 611, Laws of 1875), providing for the organization of certain business corporations, to enforce the liability for a debt of the corporation imposed by said act (§ 21), because of the signing of a certificate or report false in a material representation, the alleged false representation was that the whole capital stock, \$700,000, had been paid fully paid in. The object of the corporation, as stated in its certificate of organization, was the purchase of lands and building thereon a seaside hotel, bath-houses, etc. It appeared that the whole stock was issued to A., one of the defendants, in payment for 120 acres of land on the sea shore which was conveyed, subject to a mortgage of \$72,000, the payment of which was assumed by the company. This land was part of 140 acres purchased by A. six months before the organization of the company, and in contemplation thereof, for \$80,000, of which he paid \$8,000 and gave the said mortgage to secure the balance. The defendants were directors of the company at the time of the conveyance of the property to it. The land had no known market value at that time, or intrinsic value of large amount, disconnected from a purpose to make a use of it such as was contemplated. Defendants offered evidence on the question of value, based upon comparison with other seaside property at different places, which was objected to and excluded. *Held, no error. Huntington v. Attrill.* 365
19. Opinions of witnesses as to value, founded solely upon transactions in other property along the coast, not in the vicinity of that in question, was excluded. *Held, no error. Id.*
20. The debt which plaintiff sought to recover was a loan negotiated by S., the manager of the company for which he gave his own note, payable to its order and indorsed by him in the name of the company, giving as collateral mortgage bonds of the company. Defendants disputed the authority of S. to make the loan and claimed the debt was not that of the company. Plaintiff was permitted to prove entries in the books of the corporation in relation to the loan. *Held, no error; that the evidence was competent to show the company had the benefit of the loan, as bearing upon the question as to whether it was its debt. Id.*
21. Plaintiff was permitted to prove, on the question of value, that the land purchased, with extensive improvements thereon, was afterwards sold at judicial sale for \$175,000. *Held, no error. Id.*
22. In an action against the directors of a corporation, organized under the act of 1875 (Chap. 611, Laws of 1875), providing for the organization of certain business corporations, to recover a debt of the corporation, on the ground that defendants had signed a certificate, stating that the capital stock had been paid in, which was false, a report was offered in evidence by plaintiff, which was signed by the commissioners, to whom a license to open books for subscription to the capital was issued, which stated that the books were opened for subscriptions to the stock; that certain persons subscribed, each one at the time paying in cash ten per cent of the par value of each

share so subscribed for; that at least one-half of the stock was subscribed in accordance with the statute, and that a meeting was then called, by-laws made and directors of the company elected. Defendants were two of those commissioners. Objection was made to so much of this report as related to the action of the commission; this was overruled. It afterwards appeared, but had not then been shown, that ten per cent of the subscription had been paid in cash. *Held*, that the reception of the evidence was not error; that the report was part of the statutory proceeding to complete the organization of the company and was competent. *Hatch v. Attrill*. 383

23. Defendants offered to show that the certificate in question was filed in consequence of a suggestion of F., one of the original plaintiffs, that one should be made and filed, for the purpose of relieving defendant A. from liability under the statute, which provides, that the stockholders shall be severally individually liable to the creditors of the company to an amount equal to that of stock held by them respectively, for all debts and contracts of such company, until the whole amount of the capital stock has been paid in and a certificate thereof been made and recorded. (§ 37.) The certificate filed made no reference to the property; this evidence was objected to and excluded. *Held*, no error; that it did not tend to show acquiescence of F., in the truth of the certificate; nor could it be inferred from it, that a false certificate was within his contemplation, but rather, that the requisite statutory certificate should be made. *Id.*

24. In an action to recover damages for personal injuries sustained by plaintiff, in being thrown from a loaded wagon, the hind wheel of which ran into a hole at a crossing on defendant's road, which the complaint alleged was caused by its negligence; defendant claimed that a defect in the wagon caused, or contributed, to the injury. It attempted to show that, in consequence of the alleged defect, in

turning the wagon with a load upon it the next day after the accident it came near upsetting; this was excluded. *Held*, error. *Hoyt v. N. Y., L. E. & W. R. R. Co.* 399

25. The opinion of a witness upon the precise question the jury is to determine, is only competent when from the nature of the case the facts cannot be stated or described to the jury in such manner as to enable them to form an accurate judgment thereon, and no better evidence than such opinions is attainable. *Van Wycklen v. City of Brooklyn*. 424

26. To render the opinions of witnesses competent as evidence the subject must be one of science or skill, or one of which observation and experience has given opportunity and means of knowledge, which exist in reasons rather than descriptive facts, and, therefore, cannot be intelligently communicated to others, not familiar with the subject, so as to possess them with a full understanding of it. *Id.*

27. Such testimony cannot be resorted to, therefore, where the facts can be placed before a jury, and they are of such a nature that jurors generally are as competent to form an opinion in reference to them as witnesses. *Id.*

28. In an action to recover damages for injuries alleged to have been caused by negligence or wrongful acts of the defendant, expert testimony, to be competent, must be based on evidence in the case, and confined to the causes of the injury complained of. *Id.*

29. In an action to recover damages for alleged diversion of the waters of Spring creek which furnished water power for plaintiff's mill, the claim of plaintiff was that the water was drained from the creek by certain driven wells put down by defendant on its lands near the creek, and from which it pumped water for the city supply. Defendant called as a witness one A., who was conceded to be an expert and who constructed the wells in question,

He described the manner of their construction, and stated that they drew water from a depth below the surface ranging from thirty-five to sixty feet. The depth of the wells varied, for the purpose of getting the benefit of the water in different water-bearing strata. He was then asked: "Was it possible for you to take in those pipes any water out of Spring creek?" This was objected to as "opinionative," and excluded. *Held* (FOLLETT, Ch. J., POTTER and HAIGHT, JJ., dissenting), no error. *Id.*

80. It seems that after a party has declined to produce books and papers duly called for by the opposite party, thus compelling the latter to resort to secondary evidence of their contents, he will not be permitted to introduce them in evidence in his own behalf, to meet such secondary evidence or to give oral evidence for that purpose. *Mather v. E. M. Co.* 629

81. For the purpose of discrediting a witness who has given material testimony in favor of the party calling him, the opposite side may, on cross-examination, show that the witness has been convicted of a crime, and of what crime, and the witness may be compelled to answer. (Penal Code, § 714.) *Spiegel v. Hays.* 660

82. Where, in an action to recover an alleged agreed compensation for services, the fact of the agreement is in issue, evidence on the part of defendant of the value of such services is competent as bearing upon the issue. *Rubino v. Scott.* 662

83. In an action for the alleged conversion of certain goods plaintiff claimed under a chattel mortgage from T., the former owner. Defendant took possession under a subsequent bill of sale from T., the stipulated purchase-price having, in pursuance of the contract of sale, been credited upon an indebtedness of T. Plaintiff's mortgage had not, at the time, been filed, and defendant had no knowledge or notice thereof. Defendant offered to prove that the mortgage was fraudulent, which, on

objection, was excluded. *Held, error. Button v. Rathbone.* 668

—In action to enforce mechanic's lien for materials furnished in erecting a building on defendant's land it appeared that defendant had paid the contractor in full before the lien was filed. Plaintiff gave evidence tending to show that defendant's husband acted as her agent and made the last payment by collusion with the contractor and in violation of an express agreement. Defendant called her husband as a witness to disprove the alleged agency, his testimony was objected to and excluded. *Held, error. See Rope v. Hess, (Mem.).* 668

EXCEPTION.

—When exception not sufficiently definite to present question for review. *See Read v. Nichols.* 224

EXPERTS.

1. In an action to recover damages for personal injuries alleged to have been received by defendant's negligence, L., a medical witness called for plaintiff, was permitted to testify, under objection and exception, to his opinion as to the result of the disease in the natural and ordinary course, to wit, that the plaintiff would never be any better and never be able to straighten his limbs. *Held, no error. Alberti v. N. Y., L. E. & W. R. R. Co.* 78

2. The witness was then asked to state the length of time plaintiff might live in the natural and ordinary course of events. Upon objection the court decided that the witness might answer if he could speak with reasonable certainty. He replied he could only give the probability from the history of similar cases, and this he was permitted to do under objection and exception. *Held, no error. Id.*

3. To render the opinions of witnesses competent as evidence the subject must be one of science or skill, or one of which observation and experience have given op-

portunity and means of
edge, which exist in reason
than descriptive facts, and
fore, cannot be intelligent
municated to others, not
with the subject, so as to
them with a full understand-
it. *Van Wycklen v. City of
lyn.*

4. Such testimony cannot
sorted to, therefore, who
facts can be placed before
and they are of such a nature
jurors generally are as com-
to form an opinion in refer-
them as witnesses.

5. In an action to recover dam-
for injuries alleged to have
caused by negligence or want
acts of the defendant, expert
testimony, to be competent, must
be based on evidence in the case
confined to the causes of the
complained of.

6. In an action to recover dam-
for alleged diversion of the
of Spring creek which furnishes
water power for plaintiff
the claim of plaintiff was
the water was drained from
creek by certain drains
down by defendant on its
near the creek, and from which
pumped water for the city.
Defendant called as a witness
A., who was conceded to be
expert, and who constructed
wells in question. He described
the manner of their construction
and stated that they drew water
from a depth below the surface
ranging from thirty-five to
feet. The depth of the
varied, for the purpose of getting
the benefit of the water in
erent water-bearing strata.
was then asked: "Was it
sible for you to take in those
any water out of Spring creek?"
This was objected to as "opinion-
ative," and excluded. *Held*
LETT, Ch. J., POTTER and HARRIS,
JJ., dissenting), no error.

FACTOR.

In an action by the owner of goods
delivered to a commission merchant
for sale, against the latter,

finding R. in possession leased the same to him at a newly appraised rent. The agent knew of the relations between plaintiff and R. H. brought this action to have the lease to R. declared to be for his benefit and held as security for the payment of the contract price on the sale by him of the original lease. *Held*, that no such confidential or fiduciary relations existed between the plaintiff and R. as would require the latter to assign his lease to the former; that the relation created between them by their contract was not that of landlord and tenant, or of trustee and *cestui que trust*, but a relation analogous to that of vendor and vendee; and that therefore the action was not maintainable. *Hibbard v. Ramsdell*. 38

FINDINGS OF LAW AND FACT.

A reversal of a judgment will not be granted because a finding of fact is without evidence to support it, unless it is a material fact and to some extent at least gives support to the judgment rendered. *Wetmore v. Bruce*. 319

FORECLOSURE.

1. Plaintiff indorsed certain promissory notes for the accommodation of the maker, which were discounted by defendant, certain railroad bonds being pledged as collateral. Before the maturity of the notes, plaintiff consented that other first mortgage railroad bonds might be substituted for those pledged. The notes were transferred by defendant, and were taken up by him upon the promise of plaintiff to give his own notes therefor; he having failed so to do, defendant brought suit upon the promise. Plaintiff set up as a defense therein a misappropriation of the bonds pledged, based upon the fact that defendant accepted in lieu thereof second instead of first mortgage bonds as agreed. This defense was ruled out on the objection of defendant, and he recovered judgment. In this action, brought to recover damages for

the misappropriation, *held*, that the former judgment was not a bar, as the cause of action here was unavailable as a defense in the former action, and was not pleaded or presented as a counter-claim. *De Graaf v. Wyckoff*. 1

2. *It seems*, a judgment in a foreclosure suit under the Code of Procedure (§ 123, as amended in 1856 and 1862) is effectual to bar the right of redemption of a grantee not made a party, whose deed was subsequent to the mortgage and prior to the commencement of the foreclosure suit, but was not recorded until after the filing of *lis pendens*; at least where the plaintiff in such action had no actual notice at the time of its commencement of the unrecorded deed. *Kursheedt v. U. D. S. Institution*. 358

3. It was contemplated by the provisions of the Code of Procedure in reference to filing *lis pendens* (§ 132; see, also, Code of Civ. Pro. §§ 1670, 1671), that those, whose conveyances or incumbrances appear by the record, should be made parties in order to charge with the result of the action, those holding under or through them not made parties, whose interests do not so appear at the time of such filing. *Id.*

4. While, where the mortgagor has conveyed his interest, he is not a necessary party to the foreclosure; if he is not made a party, it is necessary to make one deriving title or interest from him, subsequent to the mortgage, a party in order to bar his right of redemption. *Id.*

5. For the purpose, therefore, of charging subsequent grantees or incumbrancers not made parties, the fact that the mortgagor has conveyed the property does not obviate the necessity of serving the summons and complaint upon him, and charging him by the decree. *Id.*

6. In an action to foreclose a mortgage, brought under the Code of Procedure, the mortgagor was made a party, but was not served

with the summons and call S., a defendant, who was appeared and answered up and proving a co from the mortgagor of h of redemption, execute the commencement of closure suit, but not and of which it did not a plaintiff therein had noti time said action was con S. at that time was ma wife was not made a p an action by a purchaser who claimed title under sale under judgment in closure suit, to recover purchase-money paid, *held* the mortgagor was not the right of dower of the S. was not cut off by t closure; that the fact t husband was a party d did not operate to bar her right of redemption; therefore, the vendor was to convey a marketable t from reasonable doubt v contemplation of the par to be conveyed in perform the contract; and that was entitled to recover.

7. By virtue of a mutual agreement between A., B., and C., parts of the same transaction conveyed to B. certain land, the latter giving back a more secure part of the purchase money. B. conveyed a portion of it with covenant of quiet enjoyment to C., who paid the purchase money in cash. This was included and was part of the cash payment made to A., and he executed release of that portion free of mortgage. C. immediately took possession of the portion conveyed to him, built a residence on it, and thereafter occupied it, but did not record his deed or the mortgage until after the mortgage and several assignments thereof were recorded, but before the recording of the assignment to plaintiff. Plaintiff brought an action to foreclose the mortgage, *held* (FOLLETT, Ch. J., dissenting), the portion was sold free from mortgage before its execution, and was never in reality included in or subjected to the lien created by the mortgage, and that, therefore, the re-

deed. *Held*, that plaintiff was not entitled to judgment; that S. acquired by his deed from H. not only his title, but, through the foreclosure proceedings, the title of the mortgagor; that S. was entitled to the protection given by the recording act against the prior unrecorded deed of plaintiff, and this, without regard to the question whether H. had or had not notice of plaintiff's deed; also that plaintiff was bound by the judgment in the foreclosure suit the same as if he had been a party thereto. (Code Pro. § 132.) *Slattery v. Schwannecke*. 543

10. It appeared that the attorneys for H. in the foreclosure suit, and who had made the loan to the mortgagor, were informed of her deed before the foreclosure. This knowledge was not acquired in any matter or proceedings relating to the making of the loan or the foreclosure of the mortgage, or while engaged in the transaction of any business for H. *Held*, that plaintiff was not charged with notice of said deed. *Id.*

FORMER ADJUDICATION.

—When party purchasing property *pendente lite*, with knowledge of plaintiff's claim, bound by judgment

See Hoxey v. Elliott. 124

—When not a bar.

See Thomson v. Sanders. 252

—When judgment in action on lease against members of a firm, lessees, does not relieve one of defendants from liability for fraud.

See N. Y. L. I. Co. v. Chapman. 288

—When wife of owner of equity of redemption, not made a party to foreclosure suit not bound by judgment therein

See Kursheedt v. U. D. S. Institution. 358

—When owner of equity of redemption whose deed is not recorded, bound by judgment in foreclosure suit.

See Slattery v. Schwannecke. 543

FRAUD.

1. In 1872, one W. recovered a judgment in South Carolina against the

plaintiff in this action of which the defendant herein was beneficial owner, although he had not the legal title. In August following, W. brought an action in this state upon the judgment. Plaintiff, by his answer therein, alleged that no process was served upon him in the South Carolina action, and that he neither appeared nor authorized an appearance in his behalf. Under a compromise agreement plaintiff paid defendant \$500 and the latter gave his bond, conditioned to indemnify and save plaintiff harmless against all claims set forth in the complaint in that action and against all costs and damages plaintiff may be compelled to pay, by reason of said action, or the claims upon which the same is based. The legal title to the South Carolina judgment was afterward assigned to defendant, who brought an action upon it against plaintiff, alleging that he was induced to compromise with him by fraud. Plaintiff answered, and the complaint was dismissed, because of the omission of defendant to tender back the \$500. This action was brought upon defendant's bond, to recover the costs and expenses incurred by the plaintiff in excess of those recovered in the action. Defendant set up as a counter-claim that he compromised with plaintiff, relying upon the truth of his allegations in his answer in the suit brought by W. in this state, and otherwise made by him; that such allegations and representations were false and fraudulent, and asked to recover the damages sustained by reason of the fraud. *Held*, that defendant's liability upon his bond was not limited to such costs and damages as plaintiff should incur in the prosecution of the claim against him by W., but included such as should arise from the prosecution of it by any other party having title to it; that the answer set up a proper counter-claim; that as the counter-claim seeks not to rescind the compromise, but simply to recover damages, because of the alleged fraud, no restoration of the \$500 so received by plaintiff from defendant upon the compromise was essential, but it might be retained by him and taken into

consideration on the question of damages. *Thomson v. Sanders*. 252

2. In an action to recover damages for an alleged fraud the complaint set forth in substance that defendant was a member of a firm to whom plaintiff had rented certain premises under a lease, which permitted it, on default in payment of the rent, to enter and dispossess the lessees and to demise the premises to others; that the lessees failed to pay the rent due; that plaintiff had an opportunity to lease the premises to a responsible party, and that it was induced by representations made by defendant, which were to his knowledge false, to allow the lessees to remain in possession, to refrain from re-entering and to refuse to lease to such other persons, and in consequence, the lessees being insolvent, plaintiff lost the rent. The complaint was dismissed upon the pleadings. *Held*, error; that the allegations of the complaint were sufficient to justify the conclusion that, but for the representations complained of, plaintiff would have availed itself of its right to re-enter, and that subsequent occupation by the lessees and the additional obligation to pay rent thereafter accruing, was permitted on the faith of the false representations. *N. Y. L. I. Co. v. Chapman*. 288
3. The question of intention is involved in all cases of fraud, founded upon alleged false representations, in so far that the maintenance of the action is dependent upon the influence of the deceit upon the party claiming to have been damaged; his purpose must have been governed by the deceit, to his prejudice to afford a remedy. *Id.*
4. The complaint also alleged that on the first of January, after the commencement of the term, the lessees sublet the premises and that plaintiff accepted from them the tenancy so created for the residue of the term. *Held*, that by taking the benefit of the subtenancy plaintiff relinquished whatever claim it might otherwise have had against the lessees accruing thereafter; but it did not relieve defendant
- from any damages plaintiff had sustained before that date by reason of the alleged fraud. *Id.*
5. The doctrine that any act in affirmance of a contract, after discovery of fraud, defeats the right of rescission is not necessarily applicable to an action for damages founded on the fraud. *Id.*
6. The complaint also alleged that in an action upon the lease plaintiff had recovered a judgment against the lessees for the unpaid rent, and that an execution issued thereon was returned unsatisfied. *Held*, that such recovery did not relieve defendant from liability upon the charge of fraud, as such liability was his only, distinct from and collateral to that of the firm, and the remedy against him was concurrent with that against the firm. *Id.*
7. It is essential to the maintenance of an action for fraud to show that damages resulted from it as the proximate cause, but it is not necessary to show that the person guilty of the fraud derived any benefit from it. *Id.*
8. Plaintiff brought an action to recover damages sustained through alleged fraudulent representations of defendant, inducing the purchase by her of certain stock. Plaintiff's evidence tended to show that the stock was worthless, and it was tendered back on the trial; one of the defendant's witnesses however testified to facts showing that it had some value. The trial judge after instructing the jury as to the particular facts necessary to establish defendant's liability, further instructed them, that if such facts were established to their satisfaction, plaintiff was entitled to a verdict for the amount paid by her for the stock to which the jury might add interest "by way of damages." Defendant's counsel excepted in these words: "I except to the instruction, that if the plaintiff is entitled to recover, she is entitled to recover the amount paid by her on the purchase of the stock whether that purchase be intended to include or exclude interest." *Held*, that

the charge was erroneous, and that defendant's exception thereto was sufficient; that it was not necessary to specifically request the court to reconsider its decision and submit the question of damages to the jury; that plaintiff was entitled to recover the difference between the value of the stock as it was, and the value as it would have been had the representations been true; and that the question as to the actual value of the stock was one, which in the absence of any waiver, defendant was entitled to have determined by the jury. *Vail v. Reynolds.* 297

9. Also, that defendant's liability was not affected by the tender on trial, as the action was not one which permitted plaintiff to return the stock. *Id.*

10. *It seems*, a person induced, by fraudulent representations, to purchase property has three remedies. He may, upon discovery of the fraud, rescind the contract absolutely and sue in an action at law to recover the consideration parted with upon the fraudulent contract; but he must first restore, or offer to restore, to the party sued, whatever he has received by virtue of the contract. He may bring an action in equity to rescind the contract and as such action is not founded upon a rescission, but to obtain one, it is sufficient for the plaintiff to offer in his complaint to return what he has received and make a tender of it on the trial. He may retain what he has received and bring an action at law to recover the damages sustained, the measure of which is the difference between the value of the article sold and what it would be if as represented. *Id.*

11. When a bank has been induced to certify a check by fraudulent representations on the part of the drawer, and the check has been transferred without indorsement, an action is not maintainable on its part to recover possession of the check. *G. N. Bk. v. Birmingham.* 349

12. The cashier of the appellant was induced by the false representa-

tions of B. to cash a draft drawn by him, place the proceeds to his credit and certify the check of B., payable to his own order. B. presented the certified check, unindorsed, to respondents, who cashed the same. While they held the check unindorsed the appellant notified them of the fraud and demanded its return, and, they refusing, commenced an action to recover its possession. The respondents subsequently obtained the indorsement of B., and payment having been refused, brought an action to recover the amount. *Held*, that neither action was maintainable. *Id.*

FRAUDULENT CONVEYANCES.

1. In such an action the complaint alleged that the assignment was made with intent to defraud; this was put in issue by the answer. It appeared that the firm was engaged in business in New York, having a branch house in Brazil; it was composed of three partners, two of whom resided in New York, the other in Brazil. B., one of the New York partners, executed the assignment; J., the other, testified that shortly before its execution, B. told him that if they did not get remittances from Brazil they would have to make an assignment; the witness answered: "If we must do it, then we must;" also, that he did not remember any other conversation with B. in reference to the assignment, but would not swear there was none. Plaintiff also, after proving by the assignee that he saw a cable from W., the Brazilian partner, dated before the assignment, assenting to it without qualification, put in evidence a letter from W. to the assignee, to the effect that he confirmed by cable the assignment of the assets of the New York firm only, it being out of his power to do more, as under Brazilian law it was necessary to settle claims there before remittance of any moneys abroad. It also appeared, and the trial court found, that W., after converting the assets in Brazil into money and paying local claims, remitted the balance to the assignee. The referee also

found that J. never objected to or questioned the assignment either before or after the execution. The assignee and one of the assignors called as witnesses for the plaintiff, both testified that the assignment was made in good faith, and there was no evidence to the contrary. At the close of the evidence the defendant's counsel requested the court to find the issue of fact in their favor; it refused, to which defendants excepted. The court found that the assignment was made without the authority or assent of J. and W., to which finding the defendants excepted. The court found as conclusion of law that the assignment was fraudulent and void as against plaintiffs. *Held*, that the findings were erroneous; and that the refusal to find and the finding of fact, there being no evidence to sustain it were, under the exceptions, reviewable in this court. (Code Civ. Pro. §§ 992, 993.) *Hooper v. Baillie*. 413

GRANTOR AND GRANTEE.

1. The ground upon which the title of a grantee may be defeated and a claim of forfeiture supported, as for breach of condition subsequent, must be substantial and clearly established. *Roser v. Hawley*. 502
2. *It seems*, that a grantor of property for a specified public use, may subject the title to liability of forfeiture for breach of a condition expressed in his deed. *Id*.

See DEED.

GUARANTY.

1. Plaintiffs, who held certain bonds as collateral for a debt due them from M., received an inclosure sent by defendant, who was a member of the firm of D. & Co., containing a letter from M. to the effect that he had accepted a position in the house of R. & Co., and pledging a portion of his salary each year until the debt was paid; also asking that "with this assurance and the letter inclosed, the bonds be

released." The letter referred to, which was also inclosed, was from defendant; after stating the employment of M. by his firm, the letter contained the following: "I will undertake that the agreement made by him to pay a certain amount to you each year shall be carried out until the indebtedness to your firm is liquidated." Plaintiffs accepted the proposition and surrendered the bonds. In an action upon the guaranty contained in defendant's letter, *held*, that the letters were to be taken and construed together; that upon their face it appeared that defendant's promise was made to procure the release of the bonds, which it accomplished, and this was a valid consideration; that, therefore, the requirements of the Statute of Frauds were met, the promise was valid and defendant was liable. *Barney v. Forbes*. 580.

2. Also, *held*, that the guaranty was not limited to the time M. remained in the employ of R. & Co. *Id*.

3. *It seems* a written guaranty given by a third person to a creditor that the debtor will pay a pre-existing debt, must, notwithstanding the amendment of the Statute of Frauds by the act of 1863 (Chap. 464, Laws of 1863), expressly or by fair implication disclose that the promise rests on a legal consideration. *Id*.

HIGHWAYS.

1. Where an owner of a tract of land conveys a portion thereof by deed which bounds the land conveyed, by a street described as laid out upon a map, and provides that it shall actually be laid out of a given width within a given time, the presumption is, the conveyance carries the fee to the center of the street. *In re Ladue*. 213
2. As between grantor and grantee a street is created where land clearly defined as to extent and location is devoted to that end by the grant, although it is not then in condition to be used as a street. *Id*.

8. In such case it may with propriety be referred to in the deed as an intended street ; the reference being to physical condition, not to title.

Id.

4. Plaintiff, in 1848, conveyed to the town of Yonkers a tract of land in the village of Yonkers ; by the terms of his deed the conveyance was upon the condition that a certain portion of said land should thereafter be and remain a part of a street named, and never be used for any other purpose, and that the residue of the premises conveyed " shall forever hereafter remain public and open as a public highway, and that no house, building or other erection whatsoever, except a public monument, shall ever be built or erected or permitted upon the said land, or any part thereof." The village was not then, but was afterward incorporated, and subsequently was incorporated as a city, and vested with the rights of property of the town. (Chap. 331, Laws of 1855 ; chap. 866, Laws of 1872.) In an action of ejectment based on the ground of a breach of said conditions, evidence was given tending to show that the premises in question were, at the time of the conveyance, bounded by a building, which was afterward taken down and a new one erected, the wall of which encroached about sixteen inches upon said premises ; the location of the line however was in dispute, and there was other evidence to the effect that there was no encroachment, and if any in fact existed, it did not appear it was with defendant's knowledge. It also appeared that an area on the south side of said building further encroached about six feet upon said premises ; that said area was covered by a sidewalk in which was a grating and a door covering a stairway, which, when open, is an obstruction, but when closed is, with the grating, flush with the sidewalk. It did not appear that the door had, by being left open, been an obstruction. *Held*, that while the purpose of the conditions was to preserve the use of the premises for a street or public highway, and anything erected upon them inconsistent with that use would

be a violation thereof, it could not be assumed that what is usually or commonly permitted or required in streets of villages and cities came within the prohibition, and the construction of the area was not an erection upon the land within the meaning of the conditions, nor was it rendered so by use. *Rose v. Hawley.* 502

See COMMISSIONERS OF HIGHWAYS.

HUSBAND AND WIFE.

1. A husband and wife agreed to live separately, and to effectuate that agreement entered into articles of separation, through the medium of a trustee, by the terms of which the husband agreed to pay to the trustee, annually a sum named, for the support of the wife during life, the same to be in full satisfaction for such support and maintenance and of all alimony ; the wife and trustee covenanted to save the husband harmless from his obligation to support her, and upon execution of the agreement the parties separated. In an action against the husband, to recover a payment under the agreement, *held*, that it was valid ; that the trustee named was the trustee of an express trust, and the action was properly brought in his name ; also *held* (FOLLETT, Ch. J., dissenting), that the agreement was not abrogated by a subsequent divorce of the parties, at least when no provision for alimony was made in the decree of divorce. *Clark v. Fosdick.* 7
2. Where a husband and wife united in a mortgage of land owned by the former, both covenanting to pay the amount secured thereby, and the former died leaving a will by which he devised the lands to his wife, *held*, that the wife was not prohibited by the Code of Civil Procedure (§ 829), from testifying as against an assignee of the mortgage to certain transactions and agreements between her husband and the mortgagee to the effect that certain accounts found due her husband from the mortgagee on settlement of accounts between them should be

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mortgage. *Holcomb v. Ca*

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porated in his patterns; these he kept in his exclusive possession, and never made them public. Defendant hired a man who was employed by plaintiff to repair the patterns, to make copies of them. Plaintiff's pump as put upon the market, does not conform to the patterns, because it is made of brass and iron, which expand unequally in the finished casting and contract unequally when cooling, during the process of casting and therefore the size of the patterns could not be discovered by merely using the different sections of the pump, but various changes were necessary which without the patterns could only be ascertained by experiments involving the expenditure of money and time. *Held* (FOLLET, Ch. J., dissenting), that plaintiff was entitled to the relief sought; that the patterns were a secret device which plaintiff had not published by putting his improved pump on the market unpatented, and which was his exclusive property until he abandoned it by publication or it was fairly discovered by another. *Tabor v. Hoffman.* 30

— *When judgment granting injunction perpetually restraining prosecution of action proper.*

See Crane v. McDonald. 648

INSURANCE (FIRE).

1. Defendant issued a policy of fire insurance upon a building described therein as "occupied as a morocco factory;" the policy contained a provision making it void in case the building became vacant or unoccupied, without the consent of the company. The building was used for a manufacturing business until about six months before the fire; after that no business was carried on in it. All the machinery remained on the property, but the building was closed and locked and in the hands of an agent for rent. The agent had the key and made frequent visits to the property to show it to persons who came to hire it, and a watchman lived next door; but when or how often he visited the property did not appear; plaintiff had not

visited it within a month before the fire. *Held*, that the building was, at the time of the fire, unoccupied within the terms of the policy, and that, therefore, it was void. *Halpin v. P. Ins. Co.* 165

2. To constitute occupancy of a building used for manufacturing purposes there must be some practical use or employment of the property; its use as a place of storage merely is not sufficient. *Id.*

3. A condition against non-occupancy must be construed and applied in reference to the subject-matter of the contract and the ordinary incidents attending the use of the insured property. *Id.*

4. An insurer has, where the policy contains such a condition, a right by the terms of his policy to the care and supervision which is involved in the use of the property contemplated by the parties at the time of entering into the contract. *Id.*

5. In an action upon a policy of fire insurance, it appeared that plaintiff employed one S. to procure for him \$5,500 of insurance. S. employed R. who procured five policies of \$1,100 each, issued by different companies; these he delivered to plaintiff. They were issued at different dates, defendant's being one of the last issued. Subsequently plaintiff paid sufficient to pay the premiums upon three of the policies, with which R. paid the premiums on the three policies first issued, leaving the premiums on defendant's policy, and one other, unpaid. Neither plaintiff nor S. knew which of the policies had been paid when S. called upon plaintiff for the balance of the unpaid premiums. This he declined to pay, stating he had insurance enough, and did not want the policies, and handed back to S. two policies; he took them and ordered them cancelled. R. discovered that they were two of the policies the premiums of which had been paid; he reported to defendant plaintiff's refusal to pay and that he had returned two of the said policies by mistake.

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Wien v. S. U. & N. Ins. C

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of the insured; that the stipulation was within the power of the parties to make, and was in the nature of and served a similar purpose to the statute of limitations and repose; that it was not a stipulation absolute to waive all defenses and to condone fraud, but provided ample time and opportunity within which they may be, but beyond which they may not be set up. *Wright v. M. B. L. Association.* 287

2. Also, *held*, that plaintiff, who claimed as assignee of H., was entitled to recover the whole amount provided by the policy, although the debt owing the payee by the insured, to secure which the insurance had been made payable to H., was less than the sum insured, or had been paid in the lifetime of the latter, or although a portion of the sum provided by the policy was designated by the payee, in a contingency, for the benefit of some other person. *Id.*

INSURANCE (MARINE).

Plaintiff shipped a cargo of leather, under a bill of lading which provided that the carrier should have the full benefit of any insurance that may have been effected upon the goods. The goods having been injured through the negligence of the carrier's employes, plaintiff brought this action upon a policy issued thereon by defendant, which provided that in case of loss defendant should be subrogated to plaintiffs as to all claims against the transporters of said merchandise, not exceeding the amount paid by said insurer, and that plaintiffs would make no agreement or do any act whereby this right of action against the carrier for losing or injuring the leather should be released or cut off. *Held*, that the provision in the bill of lading cut off the insurers rights to be subrogated to the rights and remedies of the owner against the defaulting carrier, and that thereby plaintiffs' rights to recover upon the policy was defeated. *Fayerweather v. P. Ins. Co.* 324

INTERPLEADER.

1. When a person, without collusion, is subjected to a double demand to pay an acknowledged debt, and it appears that, at least a fair doubt exists, either upon questions of fact or of law, as to the rights of the conflicting claimants, he may bring an action of interpleader against them. *Crane v. McDonald* 648
2. *It seems*, the material allegations in a complaint in such an action are, that two or more persons have preferred a claim against the plaintiff; that they claim the same thing; that plaintiff has no beneficial interest in the thing claimed; and, that he cannot determine without hazard to himself to which of the defendants the thing belongs. *Id.*
3. *It seems*, also, if it appears by the answers of the defendants, that each claims the fund or thing in dispute, no other evidence of that fact is required to entitle the plaintiff to a decree. *Id.*
4. As to whether the old rule still exists in this state requiring the plaintiff in such an action to show a privity existing between the defendants, or whether it is sufficient to show independent conflicting claims, *quære.* *Id.*
5. Plaintiff's complaint in such an action alleged, and the court found in substance, that there was due from him a sum specified upon a contract between him and G., that one of the defendants claimed said sum as assignee of G's interest in the contract, and had brought an action against him to recover the same; that the other defendant also claimed said sum as administrator of M., on the ground that he had an attorney's lien thereon; that he had obtained an attachment pursuant to which a levy had been made upon the debt and plaintiff had been forbidden to pay the same to any one except the sheriff; that plaintiff was willing and had offered to pay to either of the defendants upon being indemnified, but that both had refused to indemnify him.

The court also found that plaintiff could not, without hazard, pay the sum due to either of the defendants, and that he was not in collusion with either of them. Before the action was commenced, plaintiff paid the money into court, pursuant to its order, to abide its decision as to who was entitled thereto. Both defendants by their answers claimed the fund. *Held*, that a judgment of interpleader and granting an injunction perpetually restraining further prosecution of the action against plaintiff was properly rendered. *Id.*

JOINT TENANTS.

See TENANTS IN COMMON AND JOINT TENANTS.

LANDLORD AND TENANT.

1. One who acquires title to real estate pursuant to a tax sale is not in privity with the former owner, and an attornment by a tenant to such a purchaser is an attornment to a stranger and is, as against the former owner, void. (1 R. S. 744, § 3.) (FOLLETT, Ch. J., dissenting.) *O'Donnell v. McIntyre*. 156
2. One B. entered into possession of certain premises as plaintiff's tenant. Defendant who claimed title under a tax sale, presented his deed and demanded possession of B. The latter surrendered the house keys and agreed thereafter to continue in possession as defendant's tenant. Plaintiff went to the house with a carpenter to put on new locks, and while so engaged defendant entered and ordered her to leave, and on her refusal attempted to eject her. In an action for assault and battery, the court charged that plaintiff was at the time in possession and had the right to use reasonable force to retain possession; and that defendant had no right to use force to acquire possession. *Held* (FOLLETT, Ch. J., dissenting), no error. *Id.*
3. In an action to recover damages for an alleged fraud the complaint set forth in substance that defend-

ant was a member of a firm to whom plaintiff had rented certain premises under a lease, which permitted it, on default in payment of the rent, to enter and dispossess the lessees and to demise the premises to others; that the lessees failed to pay rent due; that plaintiff had an opportunity to lease the premises to a responsible party, and that it was induced by representations made by defendant, which were to his knowledge false, to allow the lessees to remain in possession, to refrain from re-entering and to refuse to lease to such other persons, and in consequence, the lessees being insolvent, plaintiff lost the rent. The complaint was dismissed upon the pleadings. *Held*, error; that the allegations of the complaint were sufficient to justify the conclusion that, but for the representations complained of, plaintiff would have availed itself of its right to re-enter, and that subsequent occupation by the lessees and the additional obligation to pay rent thereafter accruing, was permitted on the faith of the false representations. *N. Y. L. Ins. Co. v. Chapman*. 288

4. The complaint also alleged that on the first of January, after the commencement of the term, the lessees sublet the premises and that plaintiff accepted from them the tenancy so created for the residue of the term. *Held*, that by taking the benefit of the subtenancy plaintiff relinquished whatever claim it might otherwise have had against the lessees accruing thereafter, but it did not relieve defendant from any damages plaintiff had sustained before that date by reason of the alleged fraud. *Id.*
5. The complaint also alleged that in an action upon the lease plaintiff had recovered a judgment against the lessees for the unpaid rent, and that an execution issued thereon was returned unsatisfied. *Held*, that such recovery did not relieve defendant from liability upon the charge of fraud, as such liability was his only, distinct from and collateral to that of the firm, and the remedy against him was concurrent with that against the firm. *Id.*

6. A party entering and paying rent under a parol lease for a term of years, which fixes an annual rental, becomes, by reason of the invalidity of the demise under the statute of frauds, a tenant from year to year, and a continuance of occupancy into a second year renders him chargeable with the rent until its close; he can only terminate his tenancy at the end of the current year. *Coudert v. Cohn*. 309

7. The agent of F., plaintiffs' intestate, without having any written authority, executed a lease in writing of certain premises to defendants, for the term of two years and five months, commencing March 1, 1884, at a yearly rent named, payable in equal monthly installments. Defendants entered into possession and continued to occupy and pay rent up to August, 1885, when they left the premises and sought to surrender possession to F., who declined to accept it. In an action upon the lease, *held*, that, plaintiffs were entitled to recover the rent to March 1, 1886; that the rental year then ended and defendants could not before that time terminate their tenancy; that the time for the termination of the tenancy in any year other than that of the designated expiration of time was governed by the time of entry, not by such designation. *Id.*

See LEASE.

LEASE.

1. On May 1, 1816, M., who owned a large tract of land, executed a lease of a portion of it for three lives, named for an annual rent reserved, which lease, on February 18, 1879, had become vested in plaintiff who, on that day, entered into a written contract with defendant to sell him his right and interest for a sum to be paid in six annual installments; R. to pay also the annual rent reserved. There was no agreement on the part of plaintiff to apply for or take a new lease of the premises. At the time of making the contract none of the lives upon which the lease rested were in being, but neither party knew

this. R. paid to plaintiff the rent reserved in the original lease in 1879 and 1880, and he paid it over to the representatives of the original lessor. R. also paid two installments under the contract. It was the custom of M. on the expiration of a lease to give the tenant in possession, if satisfactory, a chance to take a new lease for ten years at a rent to be determined by the appraisal of the rental value of the land made by the lessor or his agents. In June, 1880, the agent of M.'s successor in interest entered upon said premises and finding R. in possession leased the same to him at a newly appraised rent. The agent knew of the relations between plaintiff and R. H. brought this action to have the lease to R. declared to be for his benefit and held as security for the payment of the contract price on the sale by him of the original lease. *Held*, that no such confidential or fiduciary relations existed between the plaintiff and R. as would require the latter to assign his lease to the former; that the relation created between them by their contract was not that of landlord and tenant, or of trustee and *cestui que trust*, but a relation analogous to that of vendor and vendee; and that therefore the action was not maintainable. *Hibbard v. Ramsdell*. 38

2. In an action to recover the last quarter of rent reserved by a lease for one year of a furnished dwelling-house, the answer set up as a counter-claim damages alleged to have been sustained on account of the breach of an implied covenant that said house was fit for immediate and permanent occupation. The referee found that during the term of the lease noxious gases and strong, unhealthy and disagreeable odors existed generally and in large quantities throughout the house, making defendant sick and rendering the house unhealthy and unfit for human habitation. That said gases, odors, etc., did not arise in or from any part of said house, but came from adjoining premises. That neither party knew of their existence when the lease was executed. It was not claimed that

there was any deceit or falsifications to plaintiff as to condition of the house or fitness for the purpose for which it was let. It appeared that the defendant thoroughly examined the premises before signing the lease, and neither ceased to occupy nor attempted to rescind until the last quarter of the term. That defendant's counterclaim was not tenable; and the fact that the personal property was in part the subject of the lease did not make the question. *Franklin v. .*

3. The law will not imply a covenant in a lease as to control not under the control of the landlord and with reference to which the lessee being ignorant neither could be supposed to have contracted.
4. The lessee of real property runs the risk of its condition unless he has an express agreement on the part of the lessor in reference thereto.
5. An indenture executed in which contained a grant of land reserving a perpetual annual rent after a covenant on the part of the grantees to pay the rent and various other covenants their part, contained a covenant that if the rent should be due for twenty-eight days after the day of payment specified, it should be lawful for the grantor, his heirs and assigns to enter and distress etc.; then followed this condition: "Should it at any time happen that no sufficient distress could be found upon the premises to satisfy such rent due and in arrears aforesaid, or if either of the covenants and conditions hereinbefore contained * * * shall not be performed * * * or should be broken * * * it shall be lawful for the grantor, his heirs and assigns to re-enter." In an action under the Code of Civil Procedure (§ 1504) to recover the premises the ground that six months more rent was in arrears, *held*, the right to re-enter for non-payment of rent was not limited to the case of default of sufficient distress; but that the general

that if S. had no authority H. was chargeable with the knowledge of her rights to disaffirm, whether any agreement to that effect had been made or not; that if S. had authority she was chargeable with and conclusively presumed to have acted upon the knowledge possessed by him that the delivery was conditional; and that, therefore, in either case, having received the benefits of the contract she could not after so long acquiescence disaffirm it, and so, it was irrevocable. *Hyatt v. Clark.* 568

See LANDLORD AND TENANT.

LICENSE.

———*Parol license to enter upon lands revocable at pleasure, and is revoked by conveyance of the lands without reference to the license.*

See *Taylor v. Millard.* 244

LIEN.

See FORECLOSURE.
MORTGAGE.

LIMITATION OF ACTIONS.

1. One McD. contracted to pay plaintiffs for their services in prosecuting a certain claim, twenty-five per cent of the award obtained, the payment of which was by the contract declared to be a lien upon the claim and upon any draft, money or evidence of indebtedness which might be paid or issued thereon. An award was made in favor of McD. who assigned it to W. Plaintiff thereupon commenced a suit to restrain McD. and W. from disposing of, collecting or receiving more than three-fourths of the award and for a decree establishing plaintiff's lien. An order was made appointing R. receiver with directions to collect the award and to invest a portion in certain bonds to be held to await the result of the action. A demurrer to plaintiff's bill was sustained and the bonds so held were ordered to be handed over by R. to McD. and W. who transferred them to R. &

Co., of which firm R. was a member. R. & Co. surrendered the bonds for new ones which they sold in the market. Meanwhile, the decree dismissing the bill was reversed on appeal and the case remanded to the Special Term with leave to the defendants to answer which they did. Having failed to pay into court in accordance with its direction, to the credit of the suit, the amount of the award claimed by the plaintiffs, defendants' answer was stricken out and a decree taken *pro confesso* against them, adjudging that they should pay to plaintiffs the amount claimed and that the latter have a lien therefor as provided by the contract. Plaintiff's, thereupon, more than six years after the reversal of the decree dismissing the complaint, but within six years after the final decree, commenced this action to recover said amount against the surviving partners of R. & Co. The court below held that plaintiffs had a remedy by action at law against the defendants arising on the sale of the bonds as against which the statute of limitations began to run at a time not later than that of the reversal of the decree dismissing the plaintiff's case and that their right of action was barred. *Held*, (FOLLETT, Ch. J., HAIGHT and BROWN, JJ., dissenting), error; that defendants' firm having purchased the bonds *pendente lite*, charged with knowledge of plaintiff's claim, they were bound by the result as effectually as if they had been made parties thereto, and for the purposes of the lien might be deemed to have held the bonds, and upon sale thereof, to hold the proceeds in trust for plaintiffs; that when the decree was obtained they were bound to pay plaintiffs from the proceeds of sale an amount sufficient to satisfy their lien, and concurrently in time with the arising of such duty the right to demand its performance accrued; that prior to said decree plaintiff's lien was simply equitable to be enforced only by suit in equity; that, therefore, during the pendency of the former action, the statute of limitations did not run. *Horey v. Elliott.* 124

2. A certificate of members insurance upon the life payable to H., issued by ant, contained this provision question as to the validity application or certificate of membership shall be raised, unless question be raised within two years from and after of such certificate of members and during the life of the therein named." The application upon which the certificate issued, contained an agreement if any misrepresentation of material or untrue answer or statement has been made, or if it which should have been stated the association be suppress agreement shall be void. within the two years. In an upon the certificate, defendant alleged fraud and false statement in the application; also, that had no insurable interest in the life of the insured, but that insurance was a speculative transaction on his part to secure an advantage to himself on the life of W. the trial defendant offered evidence to sustain this defense, which was objected to as inadmissible under the said provision of the certificate and excluded. *Held*, no error under the provision quoted. such defense was available to the death of the insured; the stipulation was within the contemplation of the parties to make, and the nature of and served a purpose to the statute of limitations and repose. *Wright v. L. Association.*

8. Under the provisions of the act of 1870 (Chap. 821, Laws of limiting the time for filing an action against the state to two years from the time the damages accrued when a claim is presented and proved for continuous damages part accruing within the two years the claimant is entitled to recover the damages so accruing; it is such damages as accrued at that time which are barred by the statute. *Folts v. State.*

— In an action to recover of certain United States bonds to have been loaned by plaintiff's firm, defendants gave evidence tending to show a demand by plaintiff

on a date named, to then answer why he should not be fined or expelled from membership. He appeared, the letters were exhibited to him and he admitted having written them, but denied jurisdiction in the board to try him on account of anything contained in them. The relator asked and was informed who made the charges against him. After calling attention to the fact that that member was not present he withdrew without asking for a postponement. He thereafter received notice that he had been expelled. *Held*, that the relator's appearance was not a waiver by him of the requirements of the by-laws, or recognition of the right of the board to proceed without observance of the regulations; that his expulsion was illegal and he was entitled to a peremptory *mandamus* for his reinstatement; and that a return having been made to an alternative writ, damages were properly allowed in the final order, for loss suffered in consequence of his expulsion. (Code Civ. Pro., § 2088.) *People ex rel. v. M. M. P. Union*. 101

2. Defendant's by-laws authorized the society to reinstate an expelled member by a two-thirds majority of all members present, after having paid all dues and fines standing against him, and an extra fine of fifty dollars, and that applicants for reinstatement must pass an examination the same as those for original membership. *Held*, that relator was not required to exhaust the means so provided for reinstatement before resorting to a *mandamus*; that those provisions relate to cases of expulsion supported by proceedings lawfully conducted and where the appeal is to the discretionary power of the society. *Id.*

MARRIED WOMEN.

1. In an action to recover damages for injuries sustained by plaintiff, a married woman, alleged to have been caused by defendant's negligence, the complaint contained no averment showing that she was for any reason entitled to the fruits of her labor, or that she was

engaged in business on her own account and by reason of her injuries has suffered loss therein. Plaintiff was permitted to prove on trial, under objection and exception, that she was engaged in business from which she received a certain amount per month and that because of her injuries she was prevented from working two months. *Held*, error. *Uransky v. D. D., F. B. & B. R. R. Co.* 304

2. Presumptively, damages for negligently diminishing the earning capacity of a married woman belong to her husband, and when she seeks to recover such damages, her complaint must allege that for some reason she is entitled to the fruits of her own labor, or, if she seeks to recover damages for an injury to her business, she must allege that she was engaged in business on her own account and by reason of the injury was injured therein as specifically set forth. *Id.*
3. In an action to foreclose a mortgage, brought under the Code of Procedure, the mortgagor was made a party, but was not served with the summons and complaint. S., a defendant, who was served, appeared and answered, setting up and proving a conveyance from the mortgagor of his equity of redemption, executed before the commencement of the foreclosure suit, but not recorded, and of which it did not appear the plaintiff therein had notice at the time said action was commenced. S. at that time was married; his wife was not made a party. In an action by a purchaser from one who claimed title under a deed on sale under judgment in the foreclosure suit, to recover back the purchase-money paid, *held*, that, as the mortgagor was not served, the right of dower of the wife of S. was not cut off by the foreclosure; that the fact that her husband was a party defendant did not operate to bar or defeat her right of redemption; that, therefore, the vendor was not able to convey a marketable title free from reasonable doubt, which in contemplation of the parties was

to be conveyed in perform
the contract, and that
was entitled to recover.
sheed v. U. D. S. Instituti

4. A wife's inchoate right o
is not derived from her h
but it vests at the momen
grant to her husband and s
it constructively as purcha
the grantor.

See HUSBAND AND WIF

MASTER AND SERVA

1. The duty devolves upon a
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him to be unskilled, in chu
dangerous machinery, wi
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him for such new duty. *L*
v. Gordon.
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the master selects another
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 3. In an action to recover da
for personal injuries alle
have been received by pl
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defendant's servants, it app
that plaintiff was an empl
D. & C., a firm of stevedore
had engaged to load a ship
barrels of petroleum, which
in the store-house and on the
of defendant; the latter cont
to furnish the steam engin
apparatus for hoisting and
ing the barrels and necessar
to run and manage it. D.
furnished the men to stow
the cargo. Plaintiff's duty
stand at the gang-way and
to G., defendant's employe
managed the hoisting and low
of the barrels. Plaintiff's evi
was to the effect that G. ra
barrel from the dock withou
signal, which while plaintiff
- SICKELS—VOL. LXX

3. Where, therefore, a husband and wife united in a mortgage of land owned by the former, both covenanted to pay the amount secured thereby, and the former died leaving a will by which he devised the lands to his wife, *held*, that the wife was not prohibited by said provisions from testifying as against an assignee of a mortgage to certain transactions and agreements between her husband and the mortgagee to the effect that certain accounts found due her husband from the mortgagee on settlements of accounts between them should be applied as payments upon the mortgage. *Id.*
4. Also, *held*, that her testimony as to what was said between her husband and the mortgagee in connection with each transaction, explaining the same, was competent. *Id.*
5. A mortgagor, therefore, has a right to attach as a condition of payment of the debt secured, that the owner execute a satisfaction of the mortgage. *Hulpin v. P. Ins. Co.* 165

See FORECLOSURE.

MOTIONS AND ORDERS.

Where an order of General Term reversing a judgment entered on a verdict states that the facts were not before that court for revision and that its decision was upon the law only, the legal questions are reviewable here. *Van Wycklen v. City of Brooklyn.* 424

MUNICIPAL CORPORATIONS.

1. This action was brought to recover damages for the death of M., plaintiff's intestate, a boy six years old, who was found drowned in a hole alongside a sewer constructed by defendant through private property and that of the state with the consent of the owner. It appeared that the sewer emptied into a bay; at high tide the sewage was driven back up the sewer, thus causing the cavity in question; this was about fifty feet from one of defendant's streets, along which, forming the boundary of the adjoining premises, was an embankment faced by a wall, and on top of this a fence or railing of posts and cross-bars; at a point where it was supposed the intestate went upon the premises the cross-bar was down and the wall had given away. People going to the bay had occasionally crossed there, and the ground for ten or twelve feet from the fence had the appearance of a path. It did not appear that any objection had been made by any person to the construction and maintenance of the sewer. *Held*, that no violation of any duty which the defendant owed to decedent had been shown, and so it was not liable; that as to him the construction of the sewer was not wrongful or its maintenance a nuisance; that defendant owed to him no duty of care to protect him while upon the premises, or to guard the hole, as it was not so close to the street as to make the latter unsafe. *Murphy v. City of Brooklyn.* 575
2. *It seems* the owner of the premises could not have been charged with negligence in permitting the hole to remain. *Id.*

See BUFFALO (CITY OF).
NEW YORK (CITY OF).
YONKERS (CITY OF).

MUTUAL BENEFIT ASSOCIATIONS.

1. In proceedings by *mandamus*, to compel a restoration of the relator to membership in defendant's organization on the ground that he had been unlawfully expelled, the following facts appeared: By defendant's charter (Chap. 166, Laws of 1864, as amended by chap. 321, Laws of 1878) it is provided that it may make by-laws, and that any member violating them may be expelled, after being afforded an opportunity to be heard in his defense in such manner as the by-laws shall prescribe. The by-laws provide that it shall be the duty of defendant's board of directors to investigate all charges against members; that any member bringing a charge against

another shall be required to appear personally and substantiate his charge; that the secretary shall notify the parties to appear, and if either party fail to appear, a default shall be taken, or a postponement shall be had until the next meeting of the board upon the written request of either party, fully stating acceptable reasons; also that no expulsions shall be made except on charges preferred, a copy of which shall be served upon the member charged and he given a reasonable opportunity for his defense. A member made a charge in writing against the relator, founded upon two letters written by him. A copy of the charges were not served upon the relator, but he was served with a notice to attend a meeting of the board of directors on a date named to then answer why he should not be fined or expelled from membership. He appeared, the letters were exhibited to him and he admitted having written them, but denied jurisdiction in the board to try him on account of anything contained in them. The relator asked and was informed who made the charges against him. After calling attention to the fact that that member was not present he withdrew without asking for a postponement. He thereafter received notice that he had been expelled. *Held*, that the relator's appearance was not a waiver by him of the requirements of the by-laws or recognition of the right of the board to proceed without observance of the regulations; that his expulsion was illegal and he was entitled to a peremptory *mandamus* for his reinstatement; and that a return having been made to an alternative writ, damages were properly allowed in the final order for loss suffered in consequence of his expulsion. (Code of Civil Pro., § 2088.) *People ex rel. v. M. P. Union.* 101

2. It appeared that by reason of his non-membership, after expulsion, the relator was discharged from the service in which he was engaged. *Held*, that this was the proximate result of the cause of which he complained, and as such furnished a ground for the award of

damages, and that the conclusion of the trial court, as to the amount, was not reviewable here. *Id.*

3. Defendant's by-laws authorized the society to reinstate an expelled members by a two-thirds majority of all members present, after having paid all dues and fines standing against him, and an extra fine of fifty dollars, and that applicants for reinstatement must pass an examination the same as those for original membership. *Held*, that relator was not required to exhaust the means so provided for reinstatement before resorting to a *mandamus*; that those provisions relate to cases of expulsion supported by proceedings lawfully conducted and where the appeal is to the discretionary power of the society. *Id.*

NEGLIGENCE.

1. In an action to recover damages for personal injuries alleged to have been caused by defendant's negligence, evidence as to the poverty of the plaintiff, *i. e.*, that he was dependent upon his earnings for his support, is incompetent, as bearing upon the question of damages. *Alberti v. N. Y., L. E. & W. R. R. Co.* 77
2. Inasmuch, however, as a person so injured is bound to act in good faith and to resort to such means as are reasonably within his reach to cure himself, where defendant has drawn out testimony to show that plaintiff had not had the best medical attendance, care and treatment, it is competent for the latter, for the purpose of showing that he resorted to such means as were reasonably within his reach, to prove the fact of his poverty and dependence upon his earnings, and consequently his inability to procure the best medical attendance. *Id.*
3. In an action against defendant, a common carrier of passengers, to recover damages received by plaintiff, while a passenger upon one of its boats, it appeared that the injuries were caused by a break in apparatus wholly under defendant's

control, furnished and applied by it to secure in place a hawser used in turning the vessel around before landing, at a point where there was danger of serious injury to passengers if the apparatus gave way and the hawser recoiled. *Held*, that defendant's duty to its passengers was such as to require, under the circumstances, more than ordinary diligence for their protection; that the giving way of the apparatus raised an inference of negligence, and required evidence that the injury resulting came from no want of diligence on defendant's part. Also, *held*, that the mere fact that the defective condition was not observed or apparent was not sufficient to effectually dispel the inference, if there were means available by careful examination or practical test to discover the defect; that the requirements of the higher degree of care in such case is not necessarily dependent upon actual apprehension of danger, but on the dangerous consequences which are likely to result from defective appliances. *Millerv. O. S. S. Co.* 199

4. Also, *held*, that the failure of defendant's officers and employes having charge of the vessel to give timely warning to the passengers to enable them to avoid danger, which might have been anticipated, could be considered on the question of defendant's negligence; it appearing that it was their custom to give such warning when a hawser was being used as on the occasion in question. *Id.*

5. The injury was caused by the breaking of a stick used to hold a pulley-block through which the hawser passed. Plaintiff was allowed to prove under objections and exceptions, that immediately after the accident the place of the stick was effectually supplied by one of the capstan bars which were near, and that the vessel was warped around to the dock. *Held*, no error. *Id.*

6. In an action to recover damages occasioned by a fire, alleged to have been caused by the negligence of defendants, which destroyed two buildings owned by

plaintiff, evidence offered by plaintiff for the purpose of proving the amount of damages by the destruction of one of them, was excluded on the ground that, as to that building, defendants alleged negligence was not the proximate cause of such burning. A general verdict was rendered for the defendants. *Held*, that as the verdict exculpated defendants entirely from the charge of negligence the rejection of evidence as to the amount of damages, even if erroneous, could not have prejudiced plaintiff, and so, was not a ground for reversal. *Read v. Nichols.* 224

7. It appeared from the evidence that a strong wind carried sparks from a smoke-stack belonging to defendants past the buildings in question to the roof of a building 280 feet distant from the smoke-stack, setting it on fire; the village in which the buildings were located had no fire apparatus, and there were no means of reaching the fire; after the building commenced to burn, the wind died down and changed its course; the fire communicated to another building north and thence across a street to a barn of plaintiff, then a building north of the one first set on fire was burned, and from it the fire spread to and destroyed the building as to which the testimony was excluded. *Held*, that the ruling of the court was proper; that the alleged negligent act was not the proximate cause of the loss. *Id.*

8. In an action to recover damages for injuries sustained by plaintiff, a married woman, alleged to have been caused by defendant's negligence, the complaint contained no averment showing that she was for any reason entitled to the fruits of her labor, or that she was engaged in business on her own account and by reason of her injuries has suffered loss therein. Plaintiff was permitted to prove on trial, under objection and exception, that she was engaged in business from which she received a certain amount per month and that because of her injuries she was prevented from working two months. *Held*, error. *Uransky v. D. D., E. B. & B. R. R. Co.* 304

9. Presumptively, damages for negligently diminishing the earning capacity of a married woman belong to her husband, and when she seeks to recover such damages, her complaint must allege that for some reason she is entitled to the fruits of her own labor, or, if she seeks to recover damages for an injury to her business, she must allege that she was engaged in business on her own account and by reason of the injury was injured therein as specifically set forth. *Id.*
10. In an action to recover damages for injuries, alleged to have been caused by defendant's negligence, it appeared that the platform of one of its stations is built on a curve; and so, that while the middle part of each car stopping there comes close to the platform the ends are about fourteen inches therefrom, and there is an open space between the steps of the car and the station platform of about that width. Plaintiff, a passenger, in attempting to alight from a car at this station was injured by falling into this opening. She had never landed there before; the space between the steps of the car and the platform was left open and unguarded; no warning or assistance was given by the persons in charge of the train, and there was but a single light at the station which was quite remote from the point where the accident occurred. There was evidence to the effect that it was so dark at the time that the hole could not be seen. *Held*, the question of defendant's negligence, and of contributory negligence on the part of the plaintiff was properly submitted to the jury; that defendant, by stopping its trains at the point in question, invited its passengers to alight there and was charged with the duty of using due care to provide proper and safe means of getting from its cars to the platform; that if the open space was necessary, owing to the peculiarities of the location, some precaution adapted to it should have been used, such as throwing a plank across, or stationing a trainman to assist passengers in alighting; at least it should have been well lighted, so that the hole could have been easily seen and the danger avoided; also, that plaintiff, being ignorant of any circumstance requiring the use of special care, was relieved from showing that she exercised it; that under the circumstances, which she had a right to assume existed, she was under no obligation, as matter of law, to look before she put her foot down, but it was for the jury to decide whether she should have been more vigilant and whether, had she looked, she could have seen the hole. *Boyce v. Manhattan R. Co.* 314
11. In an action to recover damages for personal injuries sustained by plaintiff, in being thrown from a loaded wagon, the hind wheel of which ran into a hole at a crossing on defendant's road, which the complaint alleged was caused by its negligence, defendant claimed that a defect in the wagon caused, or contributed to the injury. It attempted to show that, in consequence of the alleged defect, in turning the wagon with a load upon it the next day after the accident it came near upsetting; this was excluded. *Held*, error. *Hoyt v. N. Y., L. E. & W. R. R. Co.* 399
12. The court, in its charge, stated to the jury "that they were not to understand that contributory negligence means any error of judgment," and that "mere error of judgment as to what particular part of the crossing he would drive this loaded wagon over could not be called negligence." *Held*, error; that the judgment required to be exercised is that of a man of ordinary prudence, and the charge should have been limited to an error of judgment such a man might have fallen into. *Id.*
13. The duty devolves upon a master, before putting a servant, known to him to be unskilled, in charge of dangerous machinery, with the operation of which he is not acquainted, to instruct and qualify him for such new duty. *Brennan v. Gordon.* 489
14. If, for the purpose of instruction, the master selects another servant

in his employ, the latter must be, not simply as competent as the master, but absolutely competent; if he is incompetent, or negligent while performing the duty of instructor, or if he discontinues his instruction before completion, and in consequence the promoted servant is injured, the master is liable.

Id.

15. In an action to recover damages for injuries received by plaintiff through the falling of an elevator which defendants had just put into their store, it appeared that plaintiff, one of defendants' porters, who had no previous experience or knowledge, was selected to run the elevator, a fellow servant being assigned to instruct him; while left in the elevator without his instructor the accident happened. At defendants request the court charged, "If the jury find as matter of fact that the plaintiff was put under instruction of a competent instructor, and that he (the instructor) was as well acquainted as defendants with the nature and character of the service which he undertook to perform, he cannot recover." *Held*, error. *Id.*

16. In an action to recover damages for injuries received by plaintiff while attempting to alight from one of defendant's trains, it appeared that as plaintiff was about stepping from the front platform of the fourth and last car the train suddenly started and she was thrown down and injured; between the third and fourth cars a brakeman was stationed whose duty was to open the gates to permit the egress and ingress of passengers and then to close them, and give a signal by a pull upon a bell rope extending from the bell on the engine to where said brakeman was stationed; this signal was communicated to the next forward brakeman, whose duty it was to so hold the rope as not to permit the signal to pass him, and when he closed the gates under his control to transmit the signal by two pulls of the rope and so on until the signal reached the engineer, whose duty it was then to start the train. In this case the signal was given by the brakeman between the

second and third cars; he testified that he received a signal which he supposed was given by the rear brakeman; the latter, however, testified that he gave none. To explain this, evidence was given on the part of the defendant tending to show that a passenger standing in the third car about the time the train stopped, caught hold of the bell rope to steady himself. Plaintiff gave evidence tending to impeach the credibility of the forward brakeman. The court charged that if the jury found the train was started by the passenger, defendant was not negligent, but if not so started, it was negligent. Defendant's counsel then requested the court to charge, "that there was no proof that there was any vice in the system of communicating signals and the jury are not to consider the question;" this was refused except as charged. *Held*, no error; that the proposition contained in the request could have no consideration unless the act of the passenger caused the signal, and as the court had charged, in that case, defendant was not negligent, this rendered the question as to any defect in the system of signalling unimportant. *Ferry v. Manhattan R. Co.* 497

17. In an action to recover for injuries alleged to have been caused by defendant's negligence to plaintiff, a car repairer in the employ of the R., W. & O. R. R. Co., it appeared that plaintiff was at work between two cars standing on a side track, repairing the bumper of one of them, which was separated about six inches from the bumper of the other. He was supporting himself with one hand over the end of the bumper, when an unattended freight car, moved down on the track by D., an employe of defendant, who had charge of an engine engaged in making up a train, ran against the car in front of which plaintiff was at work, causing the bumpers to come together, and so crushing his arm. D. had called plaintiff's attention that morning to the car, and asked him to repair it, and before going to work plaintiff had posted his danger flag as required, in the proper place on the front car

- so that it could be plainly seen. *Held*, that the question of defendant's negligence and of contributory negligence on plaintiff's part were properly submitted to the jury; that plaintiff's manner of working could not, under the circumstances be said to be negligence as a matter of law, as he had the right to suppose defendant's servants would discharge their duty and not disregard his signal flag. *Murphy v. N. Y. C. & H. R. R. Co.* 527
18. Also, *held*, the fact the brakes of the two cars were not set or the cars properly secured as required by the rules of the company, did not, as matter of law, convict plaintiff of negligence, as, by the rules of the company, the duty to attend to this was not imposed upon him, but the station agent. *Id.*
19. In an action to recover damages for injuries to plaintiff, a passenger on one of defendant's trains, alleged to have been caused by defendant's negligence, plaintiff's evidence was to the effect that when the train stopped at her station, the guard whose duty it was to open the door of the car and fasten it by a catch provided for the purpose, and to open the gate on the platform, was absent from his post; that plaintiff opened the door, but did not shove it back over the catch, and stood in the doorway waiting for the opening of the gate; that when the guard came and opened the gate, he at the same time gave the signal for the train to start, which it did before she had time to leave the doorway, causing the door to swing to, upon her hand, injuring a finger. *Held*, that the question of defendant's negligence and of contributory negligence on the part of plaintiff were properly submitted to the jury. *Baker v. Manhattan R. Co.* 533
20. Plaintiff was a teacher in a public school, and also a private music teacher. She proved that she was unable to attend her school for six weeks, and for that period lost her salary as teacher; that the injury to her finger rendered it so sensitive that she could not strike the keys of the piano; that in giving music lessons it was necessary for her to play in connection with her instructions. There was no evidence as to the amount of her salary, or of her wages as a music teacher. The court charged, among other things, that "nothing can be allowed specifically for any of these items." Defendant's counsel requested the court to charge that there was no evidence upon which they could give any damages for loss of time as a music teacher, or for absence from her position as school teacher. This was refused, except as already charged. *Held*, no error. *Id.*
21. The exposure of a passenger to danger, which the exercise of a reasonable foresight would have anticipated and due care avoided, is negligence on the part of a carrier. *Lehr v. S. & H. P. R. R. Co.* 556
22. It may not be held, as matter of law, that the exercise of a reasonable foresight will not lead a street railway company to anticipate that overcrowding of its cars and their platforms will render accidents to passengers probable; but the question whether it is chargeable with negligence in permitting such overcrowding, is one of fact. *Id.*
23. So, also, it may not be held, as matter of law, that a passenger surrendering his seat when the car is crowded to one less able to stand than himself, contributes to an injury caused by the company's negligence. *Id.*
24. Plaintiff with his wife took passage on one of defendant's cars; as more people were waiting to take the car than it could carry, plaintiff pressed forward to procure a seat for his wife, who by reason of an injury was unable to stand, and when she entered gave the seat to her; he passed out to the rear platform, and this being crowded, stepped from the car and went to the front platform, where there appeared to be more standing room; he found it crowded, however, and

so took a position on the steps holding on to the rail on either side. After riding thus a short distance, a movement of the passengers on the platform caused him to lose his hold; he fell under the car and was injured. In an action to recover damages, it was not shown or claimed that any person, wilfully or intentionally, crowded plaintiff from his position. *Held*, that the question of defendant's negligence and contributory negligence on the part of plaintiff, were properly submitted to the jury. *Id.*

25. In an action to recover damages for personal injuries alleged to have been received by plaintiff through the negligence of one of defendant's servants, it appeared that plaintiff was an employe of D. & C., a firm of stevedores who had engaged to load a ship with barrels of petroleum, which were in the store-house and on the dock of defendant; the latter contracted to furnish the steam engine and apparatus for hoisting and lowering the barrels and necessary men to run and manage it. D. & C. furnished the men to stow away the cargo. Plaintiff's duty was to stand at the gangway and signal to G., defendant's employe, who managed the hoisting and lowering of the barrels. Plaintiff's evidence was to the effect that G. raised a barrel from the dock without any signal, which, while plaintiff's attention was engaged in the performance of another duty, swung against him, knocking him into the hold of the vessel, causing the injury complained of. The court instructed the jury that G. was defendant's servant, and for any negligence on his part it was responsible as his master. *Held*, no error; that G. and plaintiff were not co-servants, but servants of different masters. *Sanford v. S. O. Co.* 571

26. This action was brought to recover damages for the death of M., plaintiff's intestate, a boy six years old, who was found drowned in a hole alongside a sewer constructed by defendant through private property and that of the state with the consent of the owner. It ap-

peared that the sewer emptied into a bay; at high tide the sewage was driven back up the sewer, thus causing the cavity in question; this was about fifty feet from one of defendant's streets, along which, forming the boundary of the adjoining premises, was an embankment faced by a wall, and on top of this a fence or railing of posts and cross-bars; at a point where it was supposed the intestate went upon the premises the cross-bar was down and the wall had given away. People going to the bay had occasionally crossed there, and the ground for ten or twelve feet from the fence had the appearance of a path. It did not appear that any objection had been made by any person to the construction and maintenance of the sewer. *Held*, that no violation of any duty which the defendant owed the decedent had been shown, and so it was not liable; that as to him the construction of the sewer was not wrongful or its maintenance a nuisance; that defendant owed to him no duty of care to protect him while upon the premises, or to guard the hole, as it was not so close to the street as to make the latter unsafe. *Murphy v. City of Brooklyn.* 575

27. *It seems* the owner of the premises could not have been charged with negligence in permitting the hole to remain. *Id.*

— *When common carrier ceases to be liable as such and becomes liable only for negligence, and burden of proving this devolves on shipper.*

See Draper v. Pres't., etc., D. & H. C. Co. 118

NEW YORK (CITY OF).

1. In an action to recover possession of certain real estate in the city of New York, it appeared that the premises in question were part of a farm owned by B. in his lifetime. The earliest deed produced by plaintiff was one executed in 1835 to S., the grantor in which, was described as the only child and heir-at-law of B.; the truth of this recital was established by the evidence. As early as 1825 said farm was occupied by McG., a son of

said grantor, who cultivated it until 1833, during which time said grantor lived at her homestead in the neighborhood and frequently visited her son at the dwelling-house on the farm, and was in constant communication with him. When his occupation ceased, the farm was rented. *Held*, that possession in said grantor was sufficiently established. *Dunham v. Townsend*. 281

2. Plaintiff's title was objected to on the ground that the premises in question were below original high-water mark, and that the title was, therefore, in the city. The city surveyor testified that the avenue on the west side of which the lots are located, was graded between 1850 and 1853; that before that work was commenced he examined the locality, and that the land in question was about thirteen inches below high-water mark. It appeared the city had levied an assessment on said lots for said grading, and disclaimed any ownership in itself. It also appeared that prior to 1835 high-water mark was east of said avenue at that point, and that the meadows which included said lots, were above the ordinary daily tide, and were not covered by water, except during occasional and severe easterly storms. *Held*, that no title to the land was shown in the city; that the question was not as to high-water mark in 1850, but as to where high-water mark was during the occupancy of McG. *Id.*

3. In 1851 plaintiff entered into a contract with P. and others, under which they were authorized, and the consent of plaintiff's common council was given them, to construct and operate a horse railroad through certain streets in the city of New York, each of its cars to be annually licensed by the mayor, and such annual fee to be paid therefor as the common council might determine. The company was organized and the road in part constructed prior to the passage of the street railroad act of 1854 (Chap. 140 of the Laws of 1854). In 1855, the company was incorporated under and

by virtue of the General Railroad Act of 1850 (Chap. 140, Laws of 1850), and said act of 1854. The common council fixed the license fee for defendant's cars, and it paid the same from 1860 to 1874, when the Legislature passed an act (Chap. 478, Laws of 1874), requiring defendant to extend its route in said city, and providing that, when such extension was completed, defendant should operate its road, "subject only to the provisions of the General Railroad Act of this state, with its amendments." Defendant complied with the provisions of said act, and in this action to recover license fees claimed that, as no such fees were required by the General Railroad Act, it was relieved by said proviso from paying the same. *Held*, untenable; that the act of 1854 was *in pari materia* with the General Railroad Act, and in effect amended it by prohibiting the construction of a railroad upon the streets of a city save upon compliance with prescribed conditions; said act is, therefore, one of the acts subject to the provisions of which defendant holds and operates its road; also that there is nothing in the act of 1874 which limits, repeals or modifies the act of 1854. *Mayor, etc., v. E. A. R. R. Co.* 389

4. Also, *held*, that although the grant to defendant and conditions imposed upon it by the common council were void when made, not being within its powers, they were ratified and confirmed by the act of 1854 and thus became valid and binding. *Id.*

5. Also, *held*, the fact that the plaintiff's common council had passed an ordinance, imposing a penalty for a failure to procure a certificate for a license, did not operate to prevent plaintiff from maintaining the action to recover license fees. *Id.*

NOTICE.

1. *It seems*, that officers assuming the responsibility and charged with the duties of the management of the business of a corporation are chargeable with knowledge as to matters which are open to obser-

- vation and legitimately subject to their inspection and control. *Huntington v. Attrill*. 365
2. The knowledge of an agent can be charged to the principal only when clear proof was made that the knowledge was present in the agent's mind at the time of the transaction which is the subject of consideration. *Slattery v. Schwannecke*. 543
- When possession and occupancy of real estate by one holding under unrecorded deed, notice to subsequent incumbrancers.
See *Frear v. Sweet*. 454
- Officer of corporation chargeable with notice of its by-laws.
See *Douglass v. M. Ins. Co.* 484
- When principal chargeable with knowledge possessed by agent.
See *Hjatt v. Clark*. 563

NOTICE (OF SUIT PENDING).

1. *It seems*, a judgment in a foreclosure suit under the Code of Procedure (§ 123, as amended in 1856 and 1862), is effectual to bar the right of redemption of a grantee not made a party, whose deed was subsequent to the mortgage and prior to the commencement of the foreclosure suit, but was not recorded until after the filing of *his pendens*; at least where the plaintiff in such action had no actual notice at the time of its commencement of the unrecorded deed. *Kurscheidt v. U. D. S. Institution*. 358
2. It was contemplated by the provisions of the Code of Procedure in reference to filing *his pendens* (§ 132; see, also, Code of Civ. Pro., §§ 1670, 1671), that those whose conveyances or incumbrances appear by the record should be made parties in order to charge with the result of the action, those holding under or through them not made parties, whose interests do not so appear at the time of such filing.
Id.
3. sheriff, a defense is interposed, based on the statutory provision (2 R. S. 286, § 59) prohibiting that officer from taking any bond, obligation or security "by color of his office in any other case or manner than such as are provided by law," the defense is not met by proof that the instrument was taken at the instance of the defendants; its validity or invalidity is not dependent upon the question as to whether it was extorted or voluntarily given. *Haberstro v. Bedford*. 187
2. In an action against an officer of a corporation, incorporated under the act of 1875 (Chap. 611, Laws of 1875), providing for the organization of certain business corporation, to enforce the liability for a debt of the corporation imposed by said act (§ 21), because of the signing of a certificate or report false in a material representation it is not necessary to show knowledge on the part of the officer at the time of signing; proof that the writing is untrue, "in any material representation" is sufficient. *Huntington v. Attrill*. 365
3. *It seems* that officers assuming the responsibility and charged with the duties of the management of the business of a corporation are chargeable with knowledge as to matters which are open to observation and legitimately subject to their inspection and control. *Id.*
4. Plaintiff, on January 1, 1857, entered defendant's service as secretary, at a yearly salary. He continued in such service until January 19, 1885, when he was, by defendant's board of directors, removed, and a successor *pro tem.* appointed. In an action to recover as damages the salary for the remainder of that year, there was no evidence that the original hiring was for a year other than the fact that plaintiff's salary was annual. One of defendant's by-laws which went into effect in 1850 provided that its officers, including the secretary, "shall respectively hold their offices during the pleasure of the board of directors, and until the appointment of a successor, either permanently or *pro tem.*" *Held*,

OFFICE AND OFFICERS.

1. *It seems* where, in an action upon a bond or undertaking taken by a

that the action was not maintainable, that plaintiff was chargeable with notice of the by-law, and as no special contract which indicated any purpose to abridge the right of removal given by it was shown, it entered into and became part of the contract of employment; and that under the by-law the right of removal at any time was unqualified. *Douglas v. M. Ins. Co.* 484

PARTIES.

1. A husband and wife agreed to live separately, and to effectuate that agreement entered into articles of separation, through the medium of a trustee, by the terms of which the husband agreed to pay to the trustee, annually a sum named, for the support of the wife during life, the same to be in full satisfaction for such support and maintenance and of all alimony; the wife and trustee covenanted to save the husband harmless from his obligation to support her, and upon execution of the agreement the parties separated. In an action against the husband, to recover a payment under the agreement, *held*, that it was valid; that the trustee named was the trustee of an express trust, and that the action was properly brought in his name. *Clark v. Fostick.* 7

2. While, where the mortgagor has conveyed his interest, he is not a necessary party to a foreclosure; if he is not made a party, it is necessary to make one deriving title or interest from him, subsequent to the mortgage, a party in order to bar his right of redemption. *Kurshedt v. U. D. S. Institution.* 358

3. For the purpose, therefore, of charging subsequent grantees or incumbrancers not made parties, the fact that the mortgagor has conveyed the property does not obviate the necessity of serving the summons and complaint upon him, and charging him by the decree. *Id.*

4. In an action to foreclose a mortgage, brought under the Code of

Procedure, the mortgagor was made a party, but was not served with the summons and complaint. S., a defendant, who was served, appeared and answered, setting up and proving a conveyance from the mortgagor of his equity of redemption, executed before the commencement of the foreclosure suit, but not recorded, and of which it did not appear the plaintiff therein had notice at the time said action was commenced. S. at that time was married; his wife was not made a party. In an action by a purchaser from one who claimed title under a deed on sale under judgment in the foreclosure suit, to recover back the purchase-money paid, *held*, that, as the mortgagor was not served, the right of dower of the wife of S. was not cut off by the foreclosure; that the fact that the husband was a party defendant did not operate to bar or defeat her right of redemption; that, therefore, the vendor was not able to convey a marketable title free from reasonable doubt, which in contemplation of the parties was to be conveyed in performance of the contract, and that plaintiff was entitled to recover. *Id.*

— *When wife who has joined with her husband in a mortgage of lands owned by him, not prohibited by the Code of Civil Procedure (§ 829) from testifying, in an action of foreclosure brought after his death, to transactions between him and mortgagee.*

See Holcomb v. Campbell.

46

PARTITION.

1. In an action of trespass it appeared that J. and E. owned, as tenants in common, a farm of about one hundred and seventy acres, upon which there was an apple orchard. In 1850 they made a parol partition of said farm by which J. was to have one hundred acres, including the orchard, and E. the remaining seventy acres. As part of the oral agreement, E. his heirs and assigns, were to have the right to enter upon J.'s part and gather one-half of the apples, growing or to grow, in said orchard. Immediately thereafter the parties took posses-

sion of their respective portions, and they and their successors in title continued to occupy the parts so allotted to them respectively without any claim of title being made by either to the land so owned and occupied by the other. E. died in 1854; by his will he devised said seventy acres and the "appurtenances" to defendant, and gave to him all his "right, title and interest to the apples, growing or to grow, on the premises now occupied by J." Said defendant took possession of the seventy acres under the will and occupied them until 1861, when he conveyed them with "appurtenances" to M., by deed which was duly recorded but which did not mention any right to enter upon the one hundred acres and gather half the apples. Plaintiff claimed the one hundred acres, under a deed from J. Neither that deed, nor the one to plaintiff, contained any reference to any right of the owner of the seventy acres to enter upon the land conveyed. Shortly after plaintiff entered into possession, defendant, by direction of his grantee, entered upon plaintiff's premises and gathered apples from the orchard, after having been forbidden to do so by plaintiff. From the time of the parol partition until then E., and his successors in title to the seventy acres had annually gathered apples from said orchard without having been prohibited. There was no evidence that plaintiff had notice of the existence of any such right or claim when he purchased. *Held*, that defendant's entry was without right, and he was a trespasser; that a right in the nature of an easement could not be acquired by virtue of the parol agreement by the owner of the seventy acres in the remainder of the farm; that if the right in question was to belong to E. as a personal interest independent of his ownership of the seventy acres, it was not an easement proper, but an estate in the land itself; that it was inconsistent with possession or ownership in severalty, which is the sole and exact result of an effective parol partition; but that whatever was the nature of the right, unless it was a parol license,

it required a grant duly recorded to make it valid against one purchasing the one hundred acres without notice and in reliance upon the recording act; that the will of E. was not constructive notice to plaintiff, it not having been recorded in the county clerk's office; that if the right to enter was a parol license merely, it was revocable at pleasure and was revoked by conveyance of the one hundred acres without reference thereto. *Taylor v. Millard.* 244

2. *It seems* a parol partition may be made of lands owned by tenants in common, provided each party takes and retains exclusive possession of the portion allotted to him; the parol agreement alone cannot terminate the unity of possession. *Id*
3. A right in the nature of an easement cannot be created by a parol agreement for the partition of lands. *Id.*

PARTNERSHIP.

1. A general assignment for the benefit of creditors, relating solely to the property of a general partnership, all of which is personal, and reciting that it is made by the firm to which the firm name is subscribed by one of the partners, who declares in the certificate of acknowledgment "that he executed the same as and for said firm (giving its name) and under its authority and instructions of the members of said firm," is not void on its face by reason of the manner of its execution; such an assignment may legally be executed in the name of the firm, by one of the partners, if done with the oral assent of all. *Hooper v. Baillie.* 413
2. In an action by firm creditors to set aside such an assignment, if the plaintiff desires to raise the question as to the assent of the other partners, it should be presented by the pleading. *Id.*
3. If so presented, the burden is upon the plaintiff to establish that the assignment was executed without their assent. *Id.*

4. In such an action the co-
alleged that the assignm-
made with intent to defra-
was put in issue by the
It appeared that the firm
gaged in business in New
having a branch house in
it was composed of three p-
two of whom resided in
York, the other in Brazil.
of the New York partne-
cuted the assignment;
other, testified that shortly
its execution B told him
they did not get remittan-
Brazil they would have to
assignment; the witness an-
"If we must do it, then we
also, that he did not re-
any other conversation w-
reference to the assignm-
would not swear there was
Plaintiff also, after provin-
assignee that he saw a call
W., the Brazilian partne-
before the assignment, a-
to it without qualification
evidence a letter from W-
assignee, to the effect that
firmed by cable the assign-
the assets of the New Y-
only, it being out of his p-
do more, as under Brazil-
was necessary to settle clai-
before remittance of any
abroad. It also appeared,
trial court found, that V-
converting the assets in-
into money and payin-
claims, remitted the balan-
assignee. The referee als-
that J. never objected to
tioned the assignment ei-
fore or after the executio-
assignee and one of the as-
called as witnesses for the p-
both testified that the ass-
was made in good faith, an-
was no evidence to the c-
At the close of the evid-
defendant's counsel requ-
court to find the issue of
their favor; it refused, t-
defendants excepted. Th-
found that the assignm-
made without the authori-
sent of J. and W., to wh-
ing the defendants except-
court found as conclusio-
that the assignment was
lent and void as against p-
Held, that the findings
roneous; and that the re-

by putting his improved pump on the market unpatented, and which was his exclusive property until he abandoned it by publication or it was fairly discovered by another. *Taber v. Hoffman.* 30

2. An inventor has, independent of letters patents, an exclusive property in his invention, until by publication it becomes the property of the public. *Id.*

PAYMENT.

Where a mortgagee agrees that a debt due by him to the mortgagor shall be applied in payment of the mortgage, the omission of the former to indorse the payment on the mortgage, does not alter the effect of the agreement as a payment, and an assignee of the mortgage takes it subject to the payment. *Holcomb v. Campbell.* 46

PAYMENT INTO COURT.

When party making a tender seeks to make it basis of affirmative relief, must pay the money into court.

See Halpin v. P. Ins. Co. 165

PENAL CODE.

§ 714 *Spiegel v. Hayes.* 660

PHYSICIANS AND SURGEONS.

Statements made in respect to a practicing physician, imputing to him general ignorance of medical science, incompetency to treat diseases, and a general want of professional skill, are slanderous, and actionable without proof of special damages. *Cruikshank v. Gordon.* 178

PLEADINGS.

1. The authorization by the Code of Civil Procedure, (§ 535) of pleas in mitigation, in actions of slander, is not a license for their interposition in bad faith, and when they are so interposed, that fact may be considered by the jury. *Cruikshank v. Gordon.* 178

2. In an action to recover damages for an alleged fraud the complaint set forth in substance that defendant was a member of a firm to whom plaintiff had rented certain premises under a lease, which permitted it, on default in payment of the rent, to enter and dispossess the lessees and to demise the premises to others; that the lessees failed to pay rent due; that plaintiff had an opportunity to lease the premises to a responsible party, and that it was induced by representations made by defendant, which were to his knowledge false, to allow the lessees to remain in possession, to refrain from re-entering and to refuse to lease to such other persons, and in consequence, the lessees being insolvent, plaintiff lost the rent. The complaint was dismissed upon the pleadings. *Held*, error; that the allegations of the complaint were sufficient to justify the conclusion that, but for the representations complained of, plaintiff would have availed itself of its right to re-enter, and that subsequent occupation by the lessees and the additional obligation to pay rent thereafter accruing, was permitted on the faith of the false representations. *N. Y. L. Ins. Co. v. Chapman.* 288

3. A check draw upon plaintiff by one of its depositors, was altered by raising the amount and changing the name of the payee; it was delivered to the N. Y. & B. D. E. Co. an express company, for collection, indorsed in blank with the name of the fictitious payee. The express company transmitted and indorsed the check for collection to defendant's company, the W. E. Co. That company presented the same for payment and received the amount called for by it as raised, which it delivered to the N. Y. & B. D. E. Co., and that company delivered it to the person from whom it had received the check. Thereafter the fraud was discovered and the amount overpaid demanded back. The complaint, after averments as to the fraudulent alteration of the check, alleged that the "check so altered, changed and raised, and properly indorsed, was presented" by the

agent of the W. E. Co. The answer admitted that the check "properly indorsed" was presented for payment as alleged in the complaint. *Held*, that this was not an admission that the check was indorsed by the W. E. Co. *N. C. Bank v. Westcott*. 468

4. In an action by firm creditors to set aside an assignment for benefit of creditors of the firm property executed by one of the copartners, if the plaintiff desires to raise the question as to the assent of the other partners, it should be presented by the pleading. *Hooper v. Baillie*. 413

5. *It seems*, the material allegations in the complaint in such an action of interpleader are, that two or more persons have preferred a claim against the plaintiff; that they claim the same thing; that plaintiff has no beneficial interest in the thing claimed; and, that he cannot determine without hazard to himself to which of the defendants the thing belongs. *Crane v. McDonald*. 648

— *In action by married woman to recover damages for injuries caused by negligence, if she seeks to recover for loss of earnings or diminution of earning capacity, her complaint must contain allegations showing she is entitled to her earnings, or if she seeks to recover for injuries to her business, she must allege that she was engaged in business on her own account.* See *Uransky v. D. D., E. B. & B. R. R. Co.* 304

See COUNTER-CLAIM.

PRACTICE

1. Where a finding of fact by a court or referee is without evidence to support it, it is a ruling upon a question of law (Code Civ. Pro., § 993), and if excepted to, presents a legal question reviewable here. *Halpin v. P. Ins. Co.* 165

2. It is not necessary for the purposes of such review, that the case should show that it contains all the evidence; the exception appearing in the proposed case serves

as a notice to the respondent of an intention to raise the question of legal error, and puts on him the responsibility of adding, by amendment, any omitted evidence on the question. *Id.*

3. On appeal to this court from a judgment entered at General Term, "upon a verdict subject to the opinion of the court," the return must contain a "statement of the facts, of the questions of law arising thereupon, and of the determination of those questions by the General Term," as required by the Code of Civil Procedure (§ 1339); without such a statement the appeal may not be heard. *Conenhoven v. Ball*. 231

4. While in general, where exceptions have been taken on trial, it is erroneous to direct a verdict subject to the opinion of the General Term, the party taking the exceptions may waive them, and by consent the case may be submitted to the General Term, and where no exception was taken at the trial to the direction of a verdict and the objection to the power of the General Term to hear the case was not raised in that court, it will be deemed to have been waived. *Id.*

5. *It seems*, objections which are in the case, arising upon the evidence and involved in the controversy between the parties, are meritorious and available to the unsuccessful party on appeal although they may not have been considered in the lower court. *Id.*

6. Objections, however, to the proceedings not connected with the matters in issue, but which are preliminary and go only to the right and power of the court to hear the case, are technical and are deemed to have been waived if the party proceeds with the trial or argument without raising them. *Id.*

7. A party intending to question the power of the court to hear the case, should do so at his earliest opportunity, and if his objection is overruled, he should see to it that

by an appropriate order the ruling is made apparent on the record. *Id.*

— When exceptions not sufficiently definite to present question for review. See *Read v. Nichols*. 224

See APPEAL.
PLEADING.
TRIAL.

PRESUMPTIONS.

1. Where an order to discharge, a judgment-debtor in custody under an execution against his person, signed by the attorney of the creditor, is served upon the sheriff, it carries with it the presumption that it was duly authorized. *Davis v. Bove*. 55
2. While this presumption may not be conclusive upon the sheriff, it requires some action on his part, either to return it or give notice that he requires something farther, or else to act upon it as sufficient. *Id.*
3. The law will not imply a covenant in a lease as to conditions not under the control of the lessor; and with reference to which he and the lessee being ignorant, neither could be supposed to have contracted. *Franklin v. Brown*. 110
4. Where, however, no objection is taken by the pleadings on the other side to a failure to allege payment into court of money tendered, the act may be performed on trial, and, in the absence of any objection then taken, the presumption on appeal is that it was performed. *Hatpin v. P. Ins. Co.* 165
5. Where an owner of a tract of land conveys a portion thereof by deed which bounds the land conveyed by a street, described as laid out upon a map, and provides that it shall actually be laid out of a given width within a given time, the presumption is, the conveyance carries the fee to the center of the street. *In re Ladue*. 213
6. Presumptively, damages for negligently diminishing the earning capacity of a married woman be-

long to her husband, and when she seeks to recover such damages, her complaint must allege that for some reason she is entitled to the fruits of her own labor, or, if she seeks to recover damages for an injury to her business, she must allege that she was engaged in business on her own account and by reason of the injury was injured therein as specifically set forth. *Uransky v. D. D., E. B. & B. R. Co.* 304

7. In an action by the owner of goods delivered to a commission merchant for sale, against the latter, to recover as for money had and received, the proceeds of sale, it appeared that the goods were sold and sale reported before the commencement of the action. The report of sale did not state as to whether the goods had been paid for or not, but defendants claimed to apply the amount on an individual indebtedness to them. Defendants' evidence on the trial was to the effect that the goods were not in fact paid for until after the commencement of the action. *Held*, a refusal to submit to the jury the question as to whether the defendants had actually received the proceeds of sale before suit brought, and as to whether they were by their acts estopped from denying it was error; that while in the absence of evidence of authority to sell on credit, the presumption from a simple report of sale would be that the sale was for cash, the presumption was not conclusive, and evidence to the contrary having been given, the question was one of fact for the jury. *Rosenberg v. Block*. 329
8. Where a stockholder of a corporation becomes an officer thereof and assumes the duties of the office and performs them without any agreement or provision for compensation, the presumption, in view of his relation and interest, may properly arise that he intends to perform the services gratuitously. *Mather v. E. M. Co.* 629

PRINCIPAL AND AGENT.

1. Plaintiff entered into a contract with defendant, by which he sold

to him the exclusive right to performances of certain plays for thirty consecutive weeks. Defendant agreed to pay plaintiff each week "commencing the Saturday after said performance begins." In an action to recover an alleged balance due under the contract it was admitted that the performance began as contemplated by the contract. Defendant claimed that the condition of the contract was that he should produce the plays each week and without proof that he had so done plaintiff could not recover. It was untenable; that after the commencement of the performance defendant neglected or refused to produce the plays, it was a breach of the contract on his part and did not shield him from his obligation to pay the stipulated sum for each week until the end of the time specified. *Daly v. Stearns*.

2. Defendant set up as a counterclaim a right as assignee of N., to royalties on a certain play performed by plaintiff. It appeared that a contract was entered into between N. and A., a dramatic author, in which A. assigned to N. for the theatre in New York the exclusive right of performance of all plays, dramas and comedies thereof thereafter written by A.; also all property rights on all these plays for the United States," so that N. "exclusively has the right to produce and perform said plays on other stages * * * the exclusive permission to perform said plays and to fix and determine the royalty to be paid for the same and collect said royalty from the other managers, * * * to act as the sole proprietor of the same," N. to receive a certain royalty for each performance of these plays at his theatre and one-half of all royalties received by him "by the disposing of his property rights in these plays to the other theatres." An annual accounting was provided for. The contract was to continue for two years and thereafter from year to year unless revoked by one of the parties. In 1881 N., describing himself as agent of A., entered into a contract with plaintiff, giving him the right to adapt the plays of A. for performance in English, plaintiff

she had an account, payable to the order of C., and mailed it to him at Indianapolis; C. indorsed it in blank and delivered it to the H. bank for collection. The H. bank indorsed the check "for collection" and forwarded it to plaintiff, its correspondent bank in New York, "for credit;" it was received and credited to the H. bank in general account, plaintiff reserving the right to charge it back if dishonored. It did not appear that plaintiff knew or suspected that the H. bank was acting simply as a collecting agent. Plaintiff indorsed the check the day it was received "for collection and remittance," mailed it to defendant, with direction to remit by draft payable in New York city. Defendant received the check the next day, charged it to M.'s account and cancelled it, and on the same day mailed to plaintiff its draft payable to plaintiff's order on a bank in New York city for the amount, less a charge made against plaintiff for the services. The H. bank having failed, M., the drawer of the check, and C., the payee, after the check had been so paid and cancelled and the draft mailed to plaintiff, but before it was presented for payment, requested defendant to stop payment, which it did, and the draft on presentation was dishonored. In an action upon the draft, *held* (BRADLEY and BROWN, JJ., dissenting), that plaintiff was entitled to recover; that the check of M., having been charged to the account of the drawer and cancelled, and a draft therefor delivered to plaintiff, defendant had legally discharged its duty to the drawer and was released from liability thereon; that it could not thereafter assert, as against plaintiff, who was its principal, the legal rights or equities of the third person; that neither plaintiff nor defendant was an agent for C.; and conceding the latter could maintain an action against plaintiff to recover the amount of the check, as to which, *quere*, this was not available to defendant as a defense, as no contract relation existed between it and C., nor was there any privity between them. *C. E. Bank v. F. N. Bank.* 443

6. A check drawn upon plaintiff by one of its depositors, was altered by raising the amount and changing the name of the payee; it was delivered to the N. Y. & B. D. E. Co., an express company, for collection, indorsed in blank with the name of the fictitious payee. The express company transmitted and indorsed the check for collection to defendant's company, the W. E. Co. That company presented the same for payment and received the amount called for by it as raised, which it delivered to the N. Y. & B. D. E. Co., and that company delivered it to the person from whom it had received the check. Thereafter the fraud was discovered and the amount overpaid demanded back. *Held*, that an action to recover the same was not maintainable; that plaintiff was advised by the indorsement that defendant's company was simply acting as agent, and it having in good faith, before notice of the fraud, paid over the money to the company from whom it received the check, was thereby discharged from liability. *N. C. Bank v. Westcott.* 468

7. The agent who presented the check for payment indorsed his name simply upon it without adding the word agent. *Held*, that in the absence of proof of express authority in such agent to indorse, the W. E. Co. was not chargeable as indorser; that as it appeared by the restrictive indorsement upon the check that defendant had taken no title and was simply acting as agent, there was no implied authority in its agent to do anything beyond what was requisite to the performance of the agency, and this imposed upon defendant neither the duty to indorse nor to guarantee the check. *Id.*

8. The knowledge of an agent can be charged to the principal only when clear proof is made that the knowledge was present in the agent's mind at the time of the transaction which is the subject of consideration. *Slattery v. Schwannecke.* 543

9. One S., who had a general power of attorney under seal from H., who was in Europe, to manage her

property and affairs and to sell, convey and assign any portion of her real estate, entered into an agreement with C. to lease to him certain of the real estate for the term of five years, with the privilege of renewal for another like term, C. to make certain improvements on the premises. A lease was drawn up and executed by S., as agent for H., and handed to C., but as he questioned the authority of S., it was understood the acceptance thereof should await an answer from H. to a request for authority to execute it. Her answer, however, was a denial of the request and a cancellation of the power of attorney. S. showed the answer to C. and requested him to cancel the lease; this he refused to do and took possession of the premises. S. did not report to H. that the delivery of the lease was conditional, but informed her it was valid and could not be cancelled. She accepted the rent reserved by the lease until nearly the end of the original term, and saw improvements being made upon the premises by C. Upon his demanding a renewal of the lease, she was informed by S. of the conditional acceptance, and thereupon she refused subsequent payment of rent and refused to renew. *Held*, that in the absence of any claim of bad faith or collusion between S. and C., by the acceptance of the rent, H. ratified the lease, and so was bound by its terms; and this without regard to the question as to the authority of S. to execute, or as to the conditional delivery; that if S. had no authority H. was chargeable with knowledge of her right to disaffirm, whether any agreement to that effect had been made or not; that if S. had authority she was chargeable with and conclusively presumed to have acted upon the knowledge possessed by him that the delivery was conditional; and that, therefore, in either case, having received the benefits of the contract she could not after so long acquiescence disaffirm it, and so it was irrevocable. *Hyatt v. Clark*.

563

10. In an action to recover for a quantity of roofing materials, the an-

swer set up as a counter-claim that defendant entered into an oral contract with plaintiff to solicit contracts for putting on plaintiff's patent roofing within certain territory, defendant to have the exclusive right to do the work, he paying plaintiff an agreed price for the material; that aided and assisted by defendant, who contributed both time and money, plaintiff procured a contract to put the roofing on certain buildings, it being expressly agreed that defendant was to do the work; that he proceeded to make the necessary arrangements to fulfill the contract, including the purchase of certain materials plaintiff did not furnish; that he was only permitted to do a portion of the work, and plaintiff did the balance and retained the money paid therefor. Evidence was given on the part of defendant sustaining the allegations of the answer, with the proviso that the agreement was to last during the pleasure of plaintiff. *Held*, that the counter-claim was properly allowed; that the contract was not within the Statute of Frauds; that the establishment of the counter-claim did not depend upon whether under the original agreement defendant was exclusively entitled to do the work, as his agency was adopted in and extended to the transaction in question; that the right reserved by plaintiff to terminate the agreement at its pleasure was subject to the requirements of good faith, and could not be exercised after the contract for the roofing had been obtained, as to that contract, so as to deprive the agent of his profits. The contract for the work in question was at so much a square foot. Defendant was permitted to prove what it would have cost him to do the work. *Held*, no error, that the damages recoverable by defendant were the loss of profits so far as provable. *W. C. & M. Co. v. Holbrook*.

586

11. When the compensation of an agent is dependent upon the success of his effort in procuring a contract for his principal, and his subsequent performance of the work, the principal will not be permitted when the contract is obtained

and compensation assured, to terminate the agency for the sole purpose of securing to himself the agent's profits. *Id.*

12. In an action for specific performance of contract for sale of land it appeared that after the execution of the contract and before the time fixed for performance the defendant gave the plaintiff a verbal option to extend the time of performance for thirty or sixty days provided at the time fixed for performance the plaintiff would increase the purchase-price and pay an additional sum down. Plaintiff attended at the time and place specified and gave notice that he elected to accept the sixty days option and offered to pay the money required. Defendant was not present but was represented by an agent, who was not empowered to sign an extension for sixty days, and it was claimed on her behalf that in no event did the option permit an extension for more than thirty days. Said agent had no evidence of his authority to act for the defendant in any respect. Plaintiff declined to make the payment except to defendant or some one showing authority to receive it. Said agent thereupon tendered a deed and demanded payment of the balance of the purchase-money called for by the original contract, and upon plaintiff's failure to pay, gave notice, that the contract was at an end and that defendant would retain the purchase-money paid down. Plaintiff gave notice that he was ready to pay the additional sum called for by the verbal agreement at any time that defendant, or any one who could justify as her agent, would call for it. *Held*, that plaintiff had a right to be reasonably satisfied as to the authority of any person claiming to act for defendant and also to insist upon an extension in writing before making the payment; and, it being conceded there was an agreement for an extension, if the parties honestly differed as to the time, plaintiff was entitled to a reasonable time within which to perform the original agreement; that as plaintiff was not in default defendant could not terminate his rights by a

tender of a deed, and having taken an untenable position if she receded therefrom she was bound to give plaintiff notice when and where to perform the original contract, or to complete the modification thereof; and that under the circumstances it was material for the trial court to determine whether the extension was for thirty or sixty days. *Baumann v. Pinckney.* 604

13. The verbal agreement giving plaintiff the option was made on defendants behalf by the same agent who appeared for her at the time fixed for accepting the option. It was claimed for her, that as plaintiff recognized the agency in the former transaction he could not deny it in the latter. *Held*, untenable; that plaintiff in relying upon the option ran the risk of the agent's authority, and as it appeared that he was duly authorized, and that at the time specified for accepting the option no one authorized by defendant to give an extension for sixty days was present, defendant was in default, provided the option was for sixty days. *Id.*

— *An agent simply authorized to complete a contract for the purchase of real estate and take a deed, has no power to add to the stipulated consideration by assuming a contract made by the vendor to pay for services in procuring reduction or vacation of an assessment on the premises; the burden is upon the party estopped to show authority in the agent.*

See Deering v. Starr. (Mem.) 665

See BROKER.

PRIVILEGED COMMUNICATIONS.

1. Upon the trial of an action to recover damages for personal injuries alleged to have been caused by defendant's negligence, the attorney for the plaintiff has authority to expressly waive, on his behalf, the statutory provision prohibiting a physician from disclosing the information acquired by him while attending upon his patient in his professional capacity. (Code

Civ. Pro., §§ 834, 836.) *Albe*
N. Y., L. E. & W. R. R. Co.

2. *It seems* that the calling of a physician as a witness by a patient, is of itself an express waiver of the seal of secrecy imposed by the statute.

PROPERTY.

An inventor has, independent of others patents, an exclusive property in his invention, until by publication it becomes the property of the public. *Tabor v. Hoffman.*

QUESTIONS OF LAW AND FACT.

— *When question of negligence is one of fact.*

See Boyce v. Manhattan R. Co.

See Murphy v. N. Y. C. & H. R. R. Co.

See Baker v. Manhattan R. Co.

See Lehr v. S. & H. P. R. R. Co.

RAILROAD CORPORATION

1. Plaintiff shipped certain goods by defendant's road, to be transported from B. to A., consigned to herself. By the bill of lading it was provided that upon arrival of the goods at the place of destination, and when "placed upon the platform or in the storeroom of the company" awaiting delivery there to the consignee * * * or to be taken from the car by the consignee, the goods shall be held by defendant "under the liability of a warehouseman and not as a carrier." *Held*, that under the bill of lading defendant had the option on arrival of the goods to retain them in the car, or to place them in its warehouse, and in either case its liability as a common carrier ceased after the consignee had had reasonable time to call for and remove them. *Draper v. P. & H. C. Co.*
2. Plaintiff did not reside in A., was not there when the goods arrived; some days after, her agent called at the defendant's freight

mitted to the jury; that defendant, by stopping its trains at the point in question, invited its passengers to alight there, and was charged with the duty of using due care to provide proper and safe means of getting from its cars to the platform; that if the open space was necessary, owing to the peculiarities of the location, some precaution adapted to it should have been used, such as throwing a plank across, or stationing a trainman to assist passengers in alighting; at least it should have been well lighted, so that the hole could have been easily seen and the danger avoided; also, that plaintiff, being ignorant of any circumstance requiring the use of special care, was relieved from showing that she exercised it; that under the circumstances, which she had a right to assume existed, she was under no obligation, as matter of law, to look before she put her foot down, but it was for the jury to decide whether she should have been more vigilant and whether, had she looked, she could have seen the hole. *Boyce v. Manhattan R. Co.* 314

4. In 1851 plaintiff entered into a contract with P. and others, under which they were authorized, and the consent of plaintiff's common council was given them, to construct and operate a horse railroad through certain streets in the city of New York, each of its cars to be annually licensed by the mayor, and such annual fee to be paid therefor as the common council might determine. The company was organized and the road in part constructed prior to the passage of the street railroad act of 1854 (Chap. 140 of the Laws of 1854). In 1855, the company was incorporated under and by virtue of the General Railroad Act of 1850 (Chap. 140, Laws of 1850), and said act of 1854. The common council fixed the license fee for defendant's cars, and it paid the same from 1860 to 1874, when the legislature passed an act (Chap. 478, Laws of 1874), requiring defendant to extend its route in said city, and providing that, when such extension was completed, defendant should operate its road,

"subject only to the provisions of the General Railroad Act of this state, with its amendments." Defendant complied with the provisions of said act, and in this action to recover license fees claimed that, as no such fees were required by the General Railroad Act, it was relieved by said proviso from paying the same. *Held*, untenable; that the act of 1854 was *in pari materia* with the General Railroad Act, and in effect amended it by prohibiting the construction of a railroad upon the streets of a city save upon compliance with prescribed conditions; said act is, therefore, one of the acts subject to the provisions of which defendant holds and operates its road; also, that there is nothing in the act of 1874 which limits, repeals or modifies the act of 1854. *Mayor, etc., v. E. A. R. R. Co.* 339

5. Also, *held*, that although the grant to defendant and conditions imposed upon it by the common council were void when made, not being within its powers, they were ratified and confirmed by the act of 1854, and thus became valid and binding. *Id.*
6. Also, *held*, the fact that the plaintiff's common council had passed an ordinance, imposing a penalty for a failure to procure a certificate for a license, did not operate to prevent plaintiff from maintaining the action to recover license fees. *Id.*
7. In an action to recover damages for personal injuries sustained by plaintiff, in being thrown from a loaded wagon, the hind wheel of which ran into a hole at a crossing on defendant's road, which the complaint alleged was caused by its negligence; defendant claimed that a defect in the wagon caused, or contributed, to the injury. It attempted to show that, in consequence of the alleged defect, in turning the wagon with a load upon it the next day after the accident it came near upsetting; this was excluded. *Held*, error. *Hoyt v. N. Y. L., E. & W. R. R. Co.* 399
8. The court, in its charge, stated to the jury "that they were not to

understand that contributory negligence means any error of judgment," and that "mere error of judgment as to what particular part of the crossing he would drive this loaded wagon over could not be called negligence." *Held*, error; that the judgment required to be exercised is that of a man of ordinary prudence, and the charge should have been limited to an error of judgment such a man might have fallen into. *Id.*

9. In an action to recover damages for injuries received by plaintiff while attempting to alight from one of defendant's trains, it appeared that as plaintiff was about stepping from the front platform of the fourth and last car the train suddenly started and she was thrown down and injured; between the third and fourth cars a brakeman was stationed whose duty it was to open the gates to permit the egress and ingress of passengers and then to close them and give a signal by a pull upon a bell rope extending from the bell on the engine to where said brakeman was stationed; this signal was communicated to the next forward brakeman, whose duty it was to so hold the rope as not to permit the signal to pass him, and when he closed the gates under his control to transmit the signal by two pulls of the rope and so on until the signal reached the engineer, whose duty it was then to start the train. In this case the signal was given by the brakeman between the second and third cars; he testified that he received a signal which he supposed was given by the rear brakeman; the latter, however, testified that he gave none. To explain this, evidence was given on the part of the defendant tending to show that a passenger standing in the third car about the time the train stopped, caught hold of the bell rope to steady himself. Plaintiff gave evidence tending to impeach the credibility of the forward brakeman. The court charged that if the jury found the train was started by the passenger, defendant was not negligent, but if not so started, it was negligent. Defendant's counsel then requested the court to charge, "that there

was no proof that there was any vice in the system of communicating signals and the jury are not to consider the question;" this was refused, except as charged. *Held*, no error; that the proposition contained in the request could have no consideration, unless the act of the passenger caused the signal, and as the court had charged, in that case, defendant was not negligent, this rendered the question as to any defect in the system of signalling unimportant. *Ferry v. Manhattan R. Co.* 497

10. In an action to recover for injuries alleged to have been caused by defendant's negligence to plaintiff, a car repairer in the employ of the R., W. & O. R. R. Co., it appeared that plaintiff was at work between two cars standing on a side track, repairing the bumper of one of them, which was separated about six inches from the bumper of the other. He was supporting himself with one hand over the end of the bumper, when an unattended freight car, moved down on the track by D., an employee of defendant, who had charge of an engine engaged in making up a train, ran against the car in front of which plaintiff was at work, causing the bumpers to come together, and so crushing his arm. D. called plaintiff's attention that morning to the car, and asked him to repair it, and before going to work plaintiff had posted his danger flag as required, in the proper place on the front car, so that it could be plainly seen. *Held*, that the question of defendant's negligence and of contributory negligence on plaintiff's part were properly submitted to the jury; that plaintiff's manner of working could not, under the circumstances be said to be negligence as a matter of law, as he had the right to suppose defendant's servants would discharge their duty and not disregard his signal flag. *Murphy v. N. Y. C. & H. R. R. Co.* 527
11. Also, *held*, the fact the brakes of the two cars were not set or the cars properly secured as required by the rules of the company, did not, as matter of law, convict plaintiff of negligence, as, by the

- rules of the company, the duty to attend to this was not imposed upon him, but the station agent. *Id.*
12. In an action to recover damages for injuries to plaintiff, a passenger on one of defendant's trains, alleged to have been caused by defendant's negligence, plaintiff's evidence was to the effect that when the train stopped at her station, the guard whose duty it was to open the door of the car and fasten it by a catch provided for the purpose, and to open the gate on the platform, was absent from his post; that plaintiff opened the door, but did not shove it back over the catch, and stood in the doorway waiting for the opening of the gate; that when the guard came and opened the gate, he at the same time gave the signal for the train to start, which it did before she had time to leave the doorway, causing the door to swing to, upon her hand, injuring a finger. *Held*, that the question of defendant's negligence and of contributory negligence on the part of plaintiff were properly submitted to the jury. *Baker v. Manhattan R. Co.* 533
13. Plaintiff was a teacher in a public school, and also a private music teacher. She proved that she was unable to attend her school for six weeks, and for that period lost her salary as teacher; that the injury to her finger rendered it so sensitive that she could not strike the keys of the piano; that in giving music lessons it was necessary for her to play in connection with her instructions. There was no evidence as to the amount of her salary, or of her wages as a music teacher. The court charged, among other things, that "nothing can be allowed specifically for any of these items." Defendant's counsel requested the court to charge that there was no evidence upon which they could give any damages for loss of time as a music teacher, or absence from her position as school teacher. This was refused, except as already charged. *Held*, no error. *Id.*
14. It may not be held, as matter of law, that the exercise of a reasonable foresight will not lead a street railway company to anticipate that overcrowding of its cars and their platforms will render accidents to passengers probable; but the question whether it is chargeable with negligence in permitting such overcrowding, is one of fact. *Lehr v. S. & H. P. R. R. Co.* 556
15. So, also, it may not be held, as matter of law, that a passenger surrendering his seat when the car is crowded to one less able to stand than himself, contributes to an injury caused by the company's negligence. *Id.*
16. Plaintiff with his wife took passage on one of the defendant's cars; as more people were waiting to take the car than it could carry, plaintiff pressed forward to procure a seat for his wife, who by reason of an injury was unable to stand, and when she entered gave the seat to her; he passed out to the rear platform, and this being crowded, stepped from the car and went to the front platform, where there appeared to be more standing room; he found it crowded, however, and so took a position on the steps holding on to the rail on either side. After riding thus a short distance, a movement of the passengers on the platform caused him to lose his hold; he fell under the car and was injured. In an action to recover damages, it was not shown or claimed that any person, wilfully or intentionally, crowded plaintiff from his position. *Held*, that the question of defendant's negligence and contributory negligence on the part of plaintiff, were properly submitted to the jury. *Id.*
17. The provisions of the Rapid Transit Act (§ 20, chap. 606, Laws of 1875) and the General Railroad Act (Chap. 140, Laws of 1850) declaring that commissioners of appraisal shall not, in determining the amount of compensation to be made to parties owning or interested in property acquired for the construction and operation of railways by corporations organized under them "make any allowance or deduction on account of any real or supposed benefits which the

party in interest may derive the construction of the pro
railroad," apply simply to th
actually taken. Whatever l
taken must be paid for at i
market value, with no dedu
although the remainder of th
owner's property may be h
enhanced in value by the ope
of the railroad. *Neiman v.*
R. Co.

18. In considering, however
question of damages to the re
der the commissioners must
sider the effect of the road
the whole of that remainde
advantages and disadvant
benefits and injuries, and i
result is beneficial there is no
age and nothing can be awa

19 While the easements, whicl
owners of land abutting upon
lic streets have therein, are inte
in real estate and constitute l
erty, in estimating their v
when taken by a railroad comp
under said acts, they cannot
considered as property separate
distinct from the land to w
they are appurtenant, and the r
of the property owner to com
sation is measured, not by the v
of the easements separate from
land, but by the damages w
the land sustains because of
loss of the easements.

20. In estimating the damages, th
fore, for the taking away or in
fering with such easements,
benefits the abutting property
ceives from the operations of
railroad are to be taken into c
sideration as well as the loss
damage because of the interfere
with the easements.

21. An action to recover damag
to plaintiff's leasehold interest
property abutting upon cert
streets in the city of New Yo
because of interference with
easements in said streets by t
construction and operation of t
M. railway was tried on the assun
tion that said structure caused
permanent impairment of the ea
ments. By the act of 1872 (§
Chap. 585, Laws of 1872) the abo
provisions of the General Railro

his demanding a renewal of the lease, she was informed by S. of the conditional acceptance, and thereupon she refused subsequent payment of rent and refused to renew. *Held* that in the absence of any claim of bad faith or collusion between S. and C. by the acceptance of the rent, H. ratified the lease, and was so bound by its terms; and this without regard to the question as to the authority of S. to execute, or as to the conditional delivery; that if S. had no authority H. was chargeable with knowledge of her right to disaffirm, whether any agreement to that effect had been made or not; that if S. had authority she was chargeable with and conclusively presumed to have acted upon the knowledge possessed by him that the delivery was conditional; and that, therefore, in either case, having received the benefits of the contract she could not after so long acquiescence disaffirm it, and so, it was irrevocable.

Hyatt v. Clark.

563

RECORDING ACT.

1. By virtue of a mutual agreement between A., B., and C., and as parts of the same transaction, A. conveyed to B. certain lands, the latter giving back a mortgage to secure part of the purchase-price. B. conveyed a portion of the land, with covenant of quiet enjoyment, to C., who paid the purchase-price in cash. This was included in and was part of the cash payment made to A., and he executed a release of that portion from the mortgage. C. immediately went into possession of the portion deeded to him, built a residence thereon, and thereafter occupied it, but did not record his deed or the release until after the mortgage and several assignments thereof were recorded, but before the recording of the assignment to plaintiff. In an action to foreclose the mortgage, *held* (FOLLETT, Ch. J., and VANN, J. dissenting), that C's portion was sold free from the mortgage before its execution and was never in reality included therein or subjected to the lien thereof; and that, therefore, the recording acts

did not create a lien and were in nowise involved; also that because of the covenant in the deed from B. to C., the former, so far as related to the portion conveyed had an interest to protect by way of defense to the mortgage, and such defense was available both to him and his grantee; and that the several assignees of the mortgage took it subject to the equities between the original parties, and so, subject to this defense. *Prear v. Sweet.*

454

2. Also, *held*, that, although C's deed was not recorded until after the recording of the assignments, his possession and occupancy was notice of his rights to the assignees.

Id.

3. In an action to redeem certain premises from a mortgage executed to defendant H. in 1877 and duly recorded, it appeared that the property was conveyed to plaintiff in 1878, but his deed was not recorded until 1881, prior to which date the mortgage was foreclosed by H., the property being bid in by him at the sale. The deed to H. was recorded December 17, 1880. Plaintiff was not made a party to the foreclosure action, but due notice of its pendency was filed. On February 4, 1881, H., conveyed the premises to defendant S., a *bona fide* purchaser, for a good consideration. The deed to S. was recorded March 9, 1881. The court found that plaintiff took actual possession of the premises under her deed, and that H. had actual and express notice of such deed. *Held*, that plaintiff was not entitled to judgment; that S. acquired by his deed from H. not only his title, but, through the foreclosure proceedings, the title of the mortgagor; that S. was entitled to the protection given by the recording act against the prior unrecorded deed of plaintiff, and this, without regard to the question whether H. had or had not notice of the plaintiff's deed; also, that plaintiff was bound by the judgment in the foreclosure suit the same as if he had been a party thereto. (Code Pro. § 132.)

Saitey v. Schwannecke.

543

4. It appears that the attorneys for H. in the foreclosure suit, and who had made the loan to the mortgagor, were informed of her deed before the foreclosure. This knowledge was not acquired in any matter or proceedings relating to the making of the loan or the foreclosure of the mortgage, or while engaged in the transaction of any business for H. *Held*, that plaintiff was not charged with notice of said deed. *Id.*

— *A grant duly recorded is essential to the validity of an easement or interest in lands against one purchasing without notice.*

See Taylor v. Millard.

244

RECORDING DEEDS.

1. The record of a deed, to be effectual as evidence of a conveyance of a legal title to the land described, must, in some manner, represent that the instrument was sealed. *Todd v. U. D. S. Institution.* 387
2. Without the seal, the record simply represents a conveyance of the equitable title. *Id.*
3. When, however, the attestation clauses in and to the deed as recorded, represent it to have been sealed, and the deed subsequently produced, or a record thereof subsequently made, shows a seal, the previous record furnishes no affirmative evidence of the absence of a seal at the time it was made, such as to require, to sustain the claim that the conveyance was duly sealed, evidence that the seal was not surreptitiously placed thereon after that record. *Id.*
4. In an action to recover back an installment of purchase-money paid upon a contract for the sale and conveyance of a legal title by defendant to plaintiff of certain premises, the latter claimed a defect of title in that the deed under which defendant claimed was without a seal; she produced in evidence a record of the deed; the attestation clause stated the grantor had thereunto "set her hand and seal." Under the signature was the words "sealed and delivered in the presence of" P., who it

appeared took the acknowledgment. There was no mark after the name of the grantors indicating a seal, but simply a dash. An employe in the register's office for many years testified that a dash was the customary mark to denote the absence of a seal when an instrument was recorded; he also testified it was the custom of the office to return a paper left for record requiring a seal and having none, if its absence was noticed. Defendant's evidence was to the effect, that, about three years after the conveyance, on application to it for a loan, secured by mortgage on the property, its counsel, discovering that no seal appeared on the record, obtained the original deed, upon which was a seal, and procured it to be again recorded; the record showing a seal. P. testified that he witnessed the execution of the deed, and took the acknowledgment, and that there was then a seal upon it; that his attention was particularly called to that fact; that when he took acknowledgments of such instruments he invariably looked to see if there were seals after the signatures. The court found that the deed was not sealed at the time of its delivery. *Held*, error; that the record as first made was simply ineffectual as evidence of the conveyance of a legal title and did not operate as a notice of such a conveyance; that the declaration of the grantor and the subscribing witnesses to the effect the deed was sealed, together with the fact when afterwards found and recorded it had a seal, required, in the absence of evidence to the contrary, the conclusion that the seal was upon it when delivered; and that no such opposing evidence was furnished by the original record. *Id.*

RECOVERY OF POSSESSION OF REAL PROPERTY.

See EJECTMENT.

REDEMPTION.

1. *It seems* a judgment in a foreclosure suit under the Code of Procedure (§ 123, as amended in 1856

and 1862) is effectual to bar the right of redemption of a grantee not made a party, whose deed was subsequent to the mortgage and prior to the commencement of the foreclosure suit, but was not recorded until after the filing of *lis pendens*; at least where the plaintiff in such action had no actual notice at the time of its commencement of the unrecorded deed. *Kurscheidt v. U. D. S. Institution.*

358

2. While, where the mortgagor has conveyed his interest, he is not a necessary party to the foreclosure; if he is not made a party, it is necessary to make one deriving title or interest from him, subsequent to the mortgage, a party in order to bar his right of redemption. *Id.*

3. In an action to foreclose a mortgage, brought under the Code of Procedure, the mortgagor was made a party, but was not served with the summons and complaint. S., a defendant who was served, appeared and answered, setting up and proving a conveyance from the mortgagor of his equity of redemption, executed before the commencement of the foreclosure suit, but not recorded, and of which it did not appear the plaintiff therein had notice at the time said action was commenced. S. at that time was married; his wife was not made a party. In an action by a purchaser from one who claimed title under a deed on sale under judgment in the foreclosure suit, to recover back the purchase-money paid, *held*, that, as the mortgagor was not served, the right of dower of the wife of S. was not cut off by the foreclosure; that the fact that her husband was a party defendant did not operate to bar or defeat her right of redemption; that, therefore, the vendor was not able to convey a marketable title free from reasonable doubt, which in contemplation of the parties was to be conveyed in performance of the contract, and that plaintiff was entitled to recover. *Id.*

4. In an action to redeem certain premises from a mortgage executed to defendant H. in 1877 and duly recorded, it appeared that the

property was conveyed to plaintiff in 1878, but his deed was not recorded until 1881, prior to which date the mortgage was foreclosed by H., the property being bid in by him at the sale. The deed to H. was recorded December 17, 1880. Plaintiff was not made a party to the foreclosure action, but due notice of its pendency was filed. On February 4, 1881, H. conveyed the premises to defendant S., a *bona fide* purchaser, for a good consideration. The deed to S. was recorded March 9, 1881. The court found that plaintiff took actual possession of the premises under her deed, and that H. had actual and express notice of such deed. *Held*, that plaintiff was not entitled to judgment; that S. acquired by his deed from H. not only his title, but, through the foreclosure proceedings, the title of the mortgagor; that S. was entitled to the protection given by the recording act against the prior unrecorded deed of plaintiff, and this, without regard to the question whether H. had or had not notice of plaintiff's deed; also that plaintiff was bound by the judgment in the foreclosure suit the same as if he had been a party thereto. (Code Pro. § 132.) *Slattery v. Schrannecke.*

543

5. It appeared that the attorneys for H. in the foreclosure suit, and who had made the loan to the mortgagor, were informed of her deed before the foreclosure. This knowledge was not acquired in any matter or proceedings relating to the making of the loan or the foreclosure of the mortgage, or while engaged in the transaction of any business for H. *Held*, that plaintiff was not charged with notice of said deed. *Id.*
6. The knowledge of an agent can be charged to the principal only when clear proof is made that the knowledge was present in the agent's mind at the time of the transaction which is the subject of consideration. *Id.*

REFORMATION OF CONTRACT

1. H. died seized of certain real estate and leaving four children,

4. It appears that the attorney H. in the foreclosure suit, and had made the loan to the mortgagor, were informed of her deed before the foreclosure. This knowledge was not acquired in any other or proceedings relating to making of the loan or the foreclosure of the mortgage, or which was engaged in the transaction of business for H. *Held*, that plaintiff was not charged with notice of said deed.

— *A grant duly recorded is essential to the validity of an easement interest in lands against one purchasing without notice.*

See Taylor v. Millard.

RECORDING DEEDS.

1. The record of a deed, to be effectual as evidence of a conveyance of a legal title to the land described, must, in some manner, represent that the instrument was sealed. *Todd v. U. D. S. Institution.*
2. Without the seal, the record simply represents a conveyance of the equitable title.
3. When, however, the attestation clauses in and to the deed as recorded, represent it to have been sealed, and the deed subsequently produced, or a record thereof subsequently made, shows a seal, the previous record furnishes no affirmative evidence of the absence of a seal at the time it was made, so as to require, to sustain the claim, that the conveyance was not sealed, evidence that the seal was not surreptitiously placed there after that record.
4. In an action to recover back an installment of purchase money paid upon a contract for the purchase and conveyance of a legal title to the defendant to plaintiff of certain premises, the latter claimed a defect of title in that the deed under which defendant claimed was without a seal; she produced in evidence a record of the deed; the attestation clause stated the grantor had thereunto "set her hand and seal." Under the signature in the words "sealed and delivered in the presence of" P., who

were entitled to recover damages, by reason of a breach thereof, by way of counter-claim. *P. C. Co. v. Metzger.* 280

2. It is not necessary, in order to constitute an express warranty on sale of goods, that the word "warranty" should be used; a positive affirmation as to quality, understood and relied upon by the vendee as such, is sufficient. *Id.*
3. The right to recover damages for the breach of such a warranty survives acceptance. *Id.*
4. As to whether the vendee has the right to return the property on discovery of the breach, *quere.* *Id.*

See TAX SALES.

VENDOR AND PURCHASER.

SEALS.

1. When, however, the attestation clauses in and to a deed as recorded, represent it to have been sealed, and the deed subsequently produced, or a record thereof subsequently made, shows a seal, the previous record furnishes no affirmative evidence of the absence of a seal at the time it was made, such as to require, to sustain the claim that the conveyance was duly sealed, evidence that the seal was not surreptitiously placed thereon after that record. *Todd v. U. D. S. Institution.* 337
2. In an action to recover back an installment of purchase-money paid upon a contract for the sale and conveyance of a legal title by defendant to plaintiff of certain premises, the latter claimed a defect in title in that the deed under which defendant claimed was without a seal; she produced in evidence a record of the deed; the attestation clause stated the grantor had thereunto "set her hand and seal." Under the signature was the words "sealed and delivered in the presence of" P., who it appeared took the acknowledgement. There was no mark after the name of the grantors indicating a seal, but simply a dash. An employee in the register's office for many years tes-

tified that a dash was the customary mark to denote the absence of a seal when an instrument was recorded; he also testified it was the custom of the office to return a paper left for record requiring a seal and having none, if its absence was noticed. Defendant's evidence was to the effect that, about three years after the conveyance, on application to it for a loan, secured by mortgage on the property, its counsel, discovering that no seal appeared on the record, obtained the original deed, upon which was a seal, and procured it to be again recorded; the record showing a seal. P. testified that he witnessed the execution of the deed, and took the acknowledgment, and that there was then a seal upon it; that his attention was particularly called to that fact; that when he took acknowledgments of such instruments he invariably looked to see if there were seals after the signatures. The court found that the deed was not sealed at the time of its delivery. *Held*, error; that the record as first made was simply ineffectual as evidence of the conveyance of a legal title and did not operate as a notice of such a conveyance; that the declaration of the grantor and subscribing witnesses to the effect the deed was sealed, together with the fact when afterwards found and recorded it had a seal, required, in the absence of evidence to the contrary, the conclusion that the seal was upon it when delivered; and that no such opposing evidence was furnished by the original record. *Id.*

SERVICES.

1. Where a stockholder of a corporation becomes an officer thereof, assumes the duties of the office and performs them without any agreement or provision for compensation, the presumption, in view of his relation and interest, may properly arise that he intends to perform the services gratuitously. *Mather v. E. M. Co.* 629
2. In an action to recover for services as treasurer of a corporation it appeared that plaintiff was a stockholder of the corporation and was

of whom plaintiff is one. J entered into an agreement for partitioning the land among themselves, by the terms of which plaintiff was to take her interest in a lot valued at \$20,000. It was to be conveyed by the owner to J., one of their number, who was to convey the same to plaintiff and her husband as tenants in common, upon payment by husband of \$10,000 to a sister of the plaintiff. J. received a conveyance from his co-tenants in common, and directed the scrivener to draw a deed, from him to plaintiff and husband, as agreed, the scrivener, by the direction of the husband, made out the deed in his name alone; this was executed by J. without any knowledge of plaintiff, in variance from his instructions with the intention on his part of carrying out the agreement; the change was not discovered by plaintiff until after the death of the husband, and she received no consideration for the transfer of her interest to him. In an action to have said deed reformed by setting plaintiff's name as a grantee, *held*, that J., in taking title for purposes of the agreement, did so as trustee, and had no authority to convey, otherwise than as stated; that as to him and plaintiff there was a mutual mistake of fact which entitled her to the reformation sought, as the portion of the agreement requiring him to convey to the husband an undivided half independent of that requiring conveyance to plaintiff, and giving the brother no power, right or authority to change, alter or modify the agreement to convey to her; that plaintiff's husband occupying that confidential relation to her, and, having obtained the conveyance as he did, the burden was cast upon him and his successors in title, of showing that the conveyance was free from fraud or mistake. *Hauck v. Weicken*.

2. Plaintiff's husband left a will in which he devised to her certain real estate which was worth about \$3,000 above incumbrances, and bequeathed her \$10,000 in cash, in lieu of dower. After various legacies he gave his residuary estate to beneficiaries named. The person

process could be issued against defendant prior to the rendition of judgment, the extra condition added in no decree to the statutory obligation; and so might be disregarded as surplusage. *Id.*

7. Where the sureties to such an undertaking are excepted to and refuse to justify, it is not the duty of the sheriff to take active measures, such as rearresting the defendant, to relieve them from liability; nor can the sureties surrender their principal and so relieve themselves from further responsibility, and a certificate of the sheriff that they have surrendered, does not, in the absence of proof that they relied thereon, and by reason thereof have sustained injury, estop that officer from asserting their liability to him as fixed by the Code of Civil Procedure. (§ 589.) *Id.*

8. After the discharge of a defendant from arrest on giving an undertaking, and after failure of the sureties to justify, the defendant was, by virtue of a County Court order in proceedings instituted in part upon the affidavits of one of the sureties, taken by the sheriff, to an inebriate asylum; that officer having been advised by his counsel that it was his duty to obey the order, and if he failed so to do he would be guilty of contempt. The order was in fact void. While defendant was in the asylum an execution against his person was issued to the sheriff and returned by him unsatisfied. Thereafter the defendant was brought back from the asylum and taken into custody by the sheriff, who by advice of counsel accepted an undertaking from him and discharged him from arrest. Subsequently the sheriff took various steps for the purpose of procuring the exoneration of of himself as bail and the relief of the sureties in the original undertaking, by advice of their counsel and his own, and at the request of one of said sureties, he promising to pay the expense incurred. In an action by the sheriff against said sureties, *held*, their omission to justify rendered them liable; that plaintiff's action in obeying the void County Court order, and in

attempting to relieve them and himself, although he made a mistake and was ill-advised, furnished no defense; that he had a right to rely upon the indemnity furnished by defendant's undertaking, and was not required to take any affirmative action to relieve them. *Id.*

SLANDER.

1. Statements made in respect to a practicing physician, imputing to him general ignorance of medical science, incompetency to treat diseases, and a general want of professional skill, are slanderous, and actionable without proof of special damages. *Oruikshank v. Gordon.* 178

2. Defendant, in his answer in such an action, alleged, in mitigation, that plaintiff was "not sufficiently, ordinarily skilful nor competent as a physician, and had no reputation as a competent physician, and never had." Defendant offered no evidence in support of this allegation. The court read it to the jury and instructed them that if it was unproved and they believed it was inserted maliciously and without out probable cause, they might consider the imputation in aggravation of damages. *Held*, no error. *Id.*

3. The authorization by the Code of Civil Procedure (§ 535) of pleas in mitigation, in actions of slander, is not a license for their interposition in bad faith, and when they are so interposed, that fact may be considered by the jury. *Id.*

4. Two physicians were permitted to testify that plaintiff was reputed to be a competent and skillful physician. This was objected to by the defendant generally and objection overruled. *Held*, that as no ground for the objection was stated, an exception to the ruling was not available. *Id.*

5. Plaintiff was allowed to prove that, between the date when the cause of action arose, and the date when the action was begun, defendant repeated the slanders on

occasions other than those set forth in the complaint. *Held*, no error. *Id.*

6. Plaintiff was allowed to show that defendant had attempted to hire one of plaintiff's witnesses to leave the country. *Held*, no error. *Id.*

SPECIFIC PERFORMANCE.

1. In an action to compel the specific performance of a contract, by which plaintiff agreed to sell and convey, free and clear of all incumbrances, to defendant a house and lot in the city of New York, it appeared that the former owners of the land in the block in which the premises in question were situated had mutually covenanted and agreed that twelve feet of the front of the lots should not at any time be built upon, but should be forever left open for court-yards. The court found, upon evidence to sustain the finding, that the salability of the property was injured by said covenant. *Held*, that the title tendered by plaintiff was not free and clear from incumbrances, as the covenant constituted an incumbrance; and that defendant was justified in refusing to complete his purchase. *Wetmore v. Bruce.* 319

2. Also, *held*, that defendant was entitled to recover as damages by way of counter-claim the percentage paid by him at the time of purchase, the auctioneer's fees and the expenses paid for examining the title. *Id.*

3. In 1793, one S., being the owner of a large tract of land situate in the city of New York, executed a deed of a small portion thereof lying in the center of the tract. The land conveyed was described as beginning at the northermost corner of a meadow belonging to S., which was part of the land conveyed, and as bounded on one side by land of S., "intended for a road of two rods in width," as would appear by a "survey or map" stated to have been made. The deed contained a covenant on the part of the grantor "that the roads of two rods wide, as afore-

said, to run along and adjoin the southerly and westerly sides of the premises * * * according to the aforesaid survey or map shall be laid out accordingly and run from the Bloomingdale road within one year from the date hereof, and ever kept open from that time." There was no way of approach to the premises conveyed except by the road provided for. The grantor subsequently conveyed the lands opposite bounding them by said road. The lane or road was used as such until 1846; it was abandoned as a street in 1868 pursuant to the act of 1867. (Chap. 697, Laws of 1867.) There had never been any adverse claim or possession on the part of S. or his successors in interest, and during that time awards, under the power of eminent domain, had been made to persons claiming title to the road through the deed in question. In proceedings to compel a purchaser to take title under a contract, to convey to him to the center of the road, *held*, that said deed gave title to the center; and that the vendor, who showed title thereunder, was entitled to the relief sought. *In re Ladue.* 213

4. *It seems*, an action to compel the specific performance of a contract to sell land may be maintained by the vendee; he is not confined to his remedy at law; and when the answer in such an action does not raise the question of the right of the plaintiff to bring it, and no such question is raised upon the trial, a decision of the court dismissing the complaint, on the ground that plaintiff has an adequate remedy at law, is error. *Baumann v. Pinckney.* 604

STATE.

Under the provisions of the act of 1870 (Chap. 321, Laws of 1870), limiting the time for filing claims against the state to two years from the time the damages accrued, when a claim is presented and proved for continuous damages, part accruing within the two years, the claimant is entitled to recover the damages so accruing; it is

only such damages as accrued before that time which are barred by the statute. *Folta v. State*. 406

STATUTES.

A special statute providing for a particular case, as applicable to a particular locality, is not repealed by a statute general in its terms and application, unless the intention of the legislature to repeal or alter the special law is manifest, although the terms of the general act would, if strictly construed, but for the special law, include the case or cases provided for by it. *B. C. Association v. City of Buffalo*. 16

- § 8, *Chap. 225, Laws of 1841*.
- *Chap. 863, Laws of 1857*.
- See Flynn v. Hurd*. 19.
- *Chap. 519, Laws of 1870*.
- *Chap. 154, Laws of 1871*.
- *Chap. 810, Laws of 1879*.
- See B. C. Association v. City of Buffalo*. 62.
- 1 R. S. 728, §§ 51, 52.
- See Haack v. Weicken*. 68.
- *Chap. 168, Laws of 1864*.
- *Chap. 321, Laws of 1878*.
- See People ex rel. v. M. M. P. Union*. 101.
- 1 R. S. 744, § 3.
- See O'Donnell v. McIntyre*. 156.
- 2 R. S. 286, § 59.
- See Haberstro v. Bedford*. 187.
- *Chap. 697, Laws of 1867*.
- See In re Ladue*. 213.
- *Chap. 611, Laws of 1875*, §§ 14, 21.
- See Huntington v. Attrill*. 365.
- *Chap. 611, Laws of 1875*.
- See Hatch v. Attrill*. 383.
- *Chap. 140, Laws of 1850*.
- *Chap. 140, Laws of 1854*.
- *Chap. 478, Laws of 1874*.
- See Mayor, etc., v. E. A. R. R. Co*. 390.
- *Chap. 321, Laws of 1870*.
- *Chap. 205, Laws of 1883*, § 10.
- See Folta v. State*. 406.
- *Chap. 331, Laws of 1855*.
- *Chap. 66, Laws of 1872*.
- See Rose v. Hurley*. 502.
- 1 R. S. 740, § 1.
- 2 R. S. 146, § 48.
- *Chap. 245, Laws of 1880*, § 1, subd. 4.
- See Van Cleaf v. Burns*. 549.
- *Chap. 464, Laws of 1863*.

See Barney v. Forbes. 580.

— *Chap. 606, Laws of 1875*, § 20.

See Newman v. M. E. R. Co. 618.

See LIMITATION OF ACTIONS.
RECORDING ACT.
STATUTE OF FRAUDS.

STATUTE OF FRAUDS.

1. The parties entered into a contract in writing, by the terms of which, defendants sold to plaintiff a stock of patterns for \$500 and agreed to sell her such patterns as she should order during the ensuing year at prices specified; she agreeing to keep on hand a full assortment of all patterns made by defendants. Defendants also agreed that during the continuance of the contract they would take back old and undesirable patterns and give others in exchange. The contract by its terms, was to continue for the term of one year from date, "or longer, with the right of transfer, if mutually agreeable." After the expiration of the year plaintiff desiring to discontinue the business, asked defendants to take back all unsold patterns and refund the price she had paid, about \$488, and on defendants' refusal brought this action to recover the same, alleging that contemporaneously with said contract, an oral agreement was made to the effect that if at the end of the year, or at any other time, plaintiff should be dissatisfied and wish to discontinue the business, defendants would, upon notice, relieve her of the agency by taking back the patterns remaining in her hands and refunding the money paid. Held that the oral agreement was void under the statute of frauds as by its terms it was not to be performed with a year. *Gordon v. Niemann*. 152
2. A party entering and paying rent under a parol lease for a term of years, which fixes an annual rental, becomes, by reason of the invalidity of the demise under the Statute of Frauds, a tenant from year to year, and a continuance of occupancy into a second year renders him chargeable with the rent until its close; he can only terminate his

tenancy at the end of the current year. *Coudert v. Cohn.* 309

3. Plaintiffs, who held certain bonds as collateral for a debt due them from M., received an inclosure sent by defendant, who was a member of the firm of D. & Co., containing a letter from M. to the effect that he had accepted a position in the house of R. & Co., and pledging a portion of his salary each year until the debt was paid; also asking that "with this assurance and the letter inclosed, the bonds be released." The letter referred to, which was also inclosed, was from the defendant; after stating the employment of M. by his firm, the letter contained the following: "I will undertake that the agreement made by him to pay a certain amount to you each year shall be carried out until the indebtedness to your firm is liquidated." Plaintiffs accepted the proposition and surrendered the bonds. In an action upon the guaranty contained in defendant's letter, *held*, that the letters were to be taken and construed together; that upon their face it appeared that defendant's promise was made to procure the release of the bonds, which it accomplished, and this was a valid consideration; that, therefore, the requirements of the Statute of Frauds were met, the promise was valid and defendant was liable. *Barney v. Forbes.* 580

4. *It seems* a written guaranty given by a third person to a creditor that the debtor will pay a pre-existing debt, must, notwithstanding the amendment of the Statute of Frauds by the act of 1863 (Chap. 464, Laws of 1863), expressly or by fair implication disclose that the promise rests on a legal consideration. *Id.*

5. A contract for the sale of articles thereafter to be manufactured and delivered does not come within the Statute of Frauds. *W. C. & M. Co. v. Holbrook.* 586

6. So, also, that statute does not include an agreement which is not likely or is not expected to be performed within a year, if when fairly and reasonably interpreted

it admits of a valid execution within that time. *Id.*

STATUTE OF LIMITATIONS.

See LIMITATION OF ACTIONS.

STEAMSHIP COMPANIES.

1. In an action against defendant, a common carrier of passengers, to recover damages received by plaintiff, while a passenger upon one of its boats, it appeared that the injuries were caused by a break in apparatus wholly under defendant's control, furnished and applied by it to secure in place a hawser used in turning the vessel around before landing, at a point where there was danger of serious injury to passengers if the apparatus gave way and the hawser recoiled. *Held*, that defendant's duty to its passengers was such as to require, under the circumstances, more than ordinary diligence for their protection; that the giving way of the apparatus raised an inference of negligence, and required evidence that the injury resulting came from no want of diligence on defendant's part. Also, *held*, the mere fact that the defective condition was not observed or apparent was not sufficient to effectually dispel the inference, if there were means available by careful examination or practical tests to discover the defect; that the requirements of the higher degree of care in such case is not necessarily dependent upon actual apprehension of danger, but on the dangerous consequences which are likely to result from defective appliances. *Miller v. O. S. S. Co.* 199

2. Also, *held*, that the failure of defendant's officers and employees having charge of the vessel to give timely warning to the passengers to enable them to avoid danger, which might have been anticipated, could be considered on the question of defendant's negligence; it appearing that it was their custom to give such warning when a hawser was being used as on the occasion in question. *Id.*

3. The injury was caused by the breaking of a stick used to hold a pulley-block through which the hawser passed. Plaintiff was allowed to prove under objections and exceptions, that immediately after the accident the place of the stick was effectually supplied by one of the capstan bars which were near, and that the vessel was warped around the dock. *Held*, no error. *Id.*

STOCKHOLDERS.

1. Where a stockholder of a corporation becomes an officer thereof, assumes the duties of the office and performs them without any agreement or provision for compensation, the presumption, in view of his relation and interest, may properly arise that he intends to perform the services gratuitously. *Mather v. E. M. Co.* 629
2. In an action to recover for services as treasurer of a corporation it appeared that plaintiff was a stockholder of the corporation and was a member of a banking firm, the other member of which was also a stockholder and trustee which firm it was understood should have the banking business of the corporation. It also appeared that a by-law of defendant empowered its board of trustees to fix the compensation of its officers, and while that of the secretary was so fixed no compensation was designated or provided for the treasurer. *Held*, the evidence warranted the finding that there was no agreement express or implied to support plaintiff's claim and that the action was not maintainable. *Id.*

STREETS.

See HIGHWAYS.

TAX SALES.

One who acquires title to real estate pursuant to a tax sale is not in privity with the former owner, and an attornment by a tenant to such a purchaser is an attornment to a stranger and is, as against the former owner, void. (1 R. S. 744,

§ 3.) (FOLLETT, Ch. J., dissenting.) *O'Donnell v. McIntyre*. 156

TAXATION.

See ASSESSMENT AND TAXATION.

TENANTS IN COMMON AND JOINT TENANTS.

H. died seized of certain real estate and leaving four children, of whom plaintiff is one. They entered into an agreement for partitioning the land among themselves, by the terms of which plaintiff was to take her interest in a lot valued at \$20,000. This was to be conveyed by the owners to J., one of their number, who was to convey the same to plaintiff and her husband as tenants in common, upon payment by the husband of \$10,000 to a sister of the plaintiff. J. received a conveyance from his co-tenants in common, and directed the scrivener to draw a deed, from him to plaintiff and husband, as agreed, but the scrivener, by the direction of the husband, made out the deed to him alone; this was executed by J. without any knowledge of the variance from his instructions and with the intention on his part of carrying out the agreement; the change was not discovered by him or plaintiff until after the death of the husband, and she received no consideration for the transfer of her interest to him. In an action to have said deed reformed by inserting plaintiff's name as a grantee, *held*, that J., in taking title for purposes of the agreement, did so as trustee, and had no authority to convey, otherwise than as stipulated; that as to him and plaintiff, there was a mutual mistake of fact, which entitled her to the relief sought, as the portion of the agreement requiring him to convey to the husband an undivided half was independent of that requiring the conveyance to plaintiff, and gave the brother no power, right or authority to change, alter or modify the agreement to convey to her; that plaintiff's husband occupying that confidential relation to her, and, having obtained the conveyance as he did, the burden was

cast upon him and his successors in title, of showing that the conveyance was free from fraud or mistake. *Hauck v. Weircken*. 67

TENDER.

1. Where there is no dispute as to the amount of a debt, a tender may always be restricted by such conditions as by the terms of the contract the debtor on payment has a right to insist upon, and to which the creditor has no right to object. *Halpin v. P. Ins. Co.* 165
2. A mortgagor, therefore, has a right to attach as a condition of payment of the debt secured, that the owner execute a satisfaction of the mortgage. *Id.*
3. A tender, to be effectual for the purpose of stopping interest and prevent costs, must be kept good by the debtor, and whenever he seeks to make it the basis of affirmative relief it must be paid into court, so that the creditor may get the money, and that fact must be alleged in the pleading. *Id.*
4. Where, however, no objection is taken by the pleadings on the other side to a failure to allege payment into court, the act may be performed on trial, and, in the absence of any objection then taken, the presumption on appeal is that it was performed. *Id.*

— *When, where failure to make tender at time required by contract is through default of the party to whom it is to be made, a subsequent tender will be regarded as made in time.*

See Baumann v. Pinckney. 604

— *Where party has repudiated his contract, a tender by the other party is not necessary before suit for breach. Id.*

TITLE.

Where an owner of a tract of land conveys a portion thereof by deed which bounds the land conveyed, by a street described as laid out upon a map, and provides that it shall actually be laid out of a given width within a given time, the

presumption is, the conveyance carries the fee to the center of the street. *In re Ladue*. 213

— *Town of Brookhaven estopped from claiming title to portions of land under water of Great South bay; also when evidence of user insufficient to show title in town by acquiescence.*

See Trustees, etc., v. Smith. 634

TOWNS.

1. In an action brought by the commissioner of highways of the town of H. against the commissioners of highways of the towns of W. C. and C. to recover back moneys, alleged to have been paid by plaintiff in repairing a bridge between said towns, in excess of the proportion of plaintiff's town; it appeared that the stream crossed by the bridge divided the town of H. from the towns of W. C. and C., and that the commissioners of the three towns worked together in making the repairs; it was understood that plaintiff was to pay one-half of the expense and the commissioners of the other two towns each one-fourth; after the repairs were completed, the three commissioners accounted with each other and a final adjustment of accounts was had on the basis above stated; they respectively submitted their accounts for audit, and upon their being audited, each commissioner was reimbursed by taxes collected from his town. *Held*, that conceding each town should have paid one-third of the expense, the error on the part of plaintiff was one of law and not of fact, and the overpayment made by him could not be recovered back; that when plaintiff exceeded the proportion of the expense with which he was authorized to burden his town his act was individual and not official and the rule as to voluntary payments applied; that the town could not by subsequently reimbursing him alter or affect the legal status of the parties as it existed prior to such reimbursement. *Flynn v. Hurd*. 19

2. Also *held*, that the action was not maintainable because the requirements of the statute establishing

the precedent condition upon which the liability of a town for the repair of a bridge is enforceable had not been complied with. *Id.*

3. The duty to repair does not alone in such case authorize the making of the repairs by the commissioners of one of two towns jointly liable and the maintenance of an action against the commissioner of the other town to recover its proportion; it must appear that notice was given as prescribed by statute (§ 3, Chap. 225, Laws of 1841, as amended by chap. 883, Laws of 1857), and that the commissioner notified did not within the time prescribed consent or did not unite in making the repairs. *Id.*

See BROOKHAVEN (TOWN OF).

TRESPASS.

In an action of trespass it appeared that J. and E. owned, as tenants in common, a farm of about one hundred and seventy acres, upon which there was an apple orchard. In 1850 they made a parol partition of said farm by which J. was to have one hundred acres, including the orchard, and E. the remaining seventy acres. As part of the oral agreement, E., his heirs and assigns, were to have the right to enter upon J.'s part and gather one-half of the apples, growing or to grow, in said orchard. Immediately thereafter the parties took possession of their respective portions, and they and their successors in title continued to occupy the parts so allotted to them respectively without any claim of title being made by either to the land so owned and occupied by the other. E. died in 1854; by his will he devised said seventy acres and the "appurtenances" to defendant, and gave to him all his "right, title and interest to the apples, growing or to grow, on the premises now occupied by J." Said defendant took possession of the seventy acres under the will and occupied them until 1861, when he conveyed them with "appurtenances" to M., by deed which was duly recorded but which did not mention any right to enter upon the one hundred acres

and gather half the apples. Plaintiff claimed the one hundred acres, under a deed from J. Neither that deed, nor the one to plaintiff, contained any reference to any right of the owner of the seventy acres to enter upon the land conveyed. Shortly after plaintiff entered into possession, defendant, by direction of his grantee, entered upon plaintiff's premises and gathered apples from the orchard, after having been forbidden to do so by plaintiff. From the time of the parol partition until then, E., and his successors in title to the seventy acres, had annually gathered apples from said orchard without having been prohibited. There was no evidence that plaintiff had notice of the existence of any such right or claim when he purchased. *Held*, that defendant's entry was without right, and he was a trespasser. *Taylor v. Millard.* 244

TRIAL.

1. Defendant, in his answer in an action brought by a physician for slander, in charging him with ignorance, incompetency and want of professional skill, alleged, in mitigation, that plaintiff was "not sufficiently, ordinarily skillful nor competent as a physician, and had no reputation as a competent physician and never had." Defendant offered no evidence in support of this allegation. The court read it to the jury and instructed them that if it was unproved and they believed it was inserted maliciously and without probable cause, they might consider the imputation in aggravation of damages. *Held*, no error. *Cruikshank v. Gordon.* 178
2. The authorization by the Code of Civil Procedure (§ 535), of pleas in mitigation, in actions of slander, is not a license for their interposition in bad faith, and when they are so interposed, that fact may be considered by the jury. *Id.*
3. Two physicians were permitted to testify that plaintiff was reputed to be a competent and skillful physician. This was objected to by the defendant generally and objection overruled. *Held*, that as no

ground for the objection was stated, an exception to the ruling was not available. *Id.*

4. In an action to recover damages occasioned by a fire, alleged to have been caused by the negligence of defendants, which destroyed two buildings owned by plaintiff, evidence offered by plaintiff for the purpose of proving the amount of damages by the destruction of one of them, was excluded on the ground that, as to that building, the defendants' alleged negligence was not the proximate cause of such burning. A general verdict was rendered for the defendants. *Held*, that as the verdict exculpated defendants entirely from the charge of negligence the rejection of evidence as to the amount of damages, even if erroneous, could not have prejudiced plaintiff, and so, was not a ground for reversal. *Read v. Nichols.* 224
5. It appeared from the evidence that a strong wind carried sparks from a smoke-stack belonging to defendants past the buildings in question to the roof of a building 280 feet distant from the smoke-stack, setting it on fire; the village in which the buildings were located had no fire apparatus, and there were no means of reaching the fire; after the building commenced to burn, the wind died down and changed its course; the fire communicated to another building north and thence across a street to a barn of plaintiff, then a building north of the one first set on fire was burned, and from it the fire spread to and destroyed the building as to which the testimony was excluded. *Held*, that the ruling of the court was proper; that the alleged negligent act was not the proximate cause of the loss. *Id.*
6. At the close of the evidence, plaintiff's counsel presented to the court thirteen separate requests to charge. Some were charged as requested, some in a modified form and others refused. At the close of the charge plaintiff's counsel stated that he excepted, "to the refusals to charge as requested by plaintiff's counsel in so far as the court did refuse and to each of the refusals to charge as requested." *Held*, that this exception was not sufficiently definite and specific to present a question for review. *Id.*
7. Five written propositions were submitted by the court to the jury with instructions that each should be answered as they determined the fact to be. Plaintiff's counsel excepted to such submission. Upon the coming in of the jury the foreman stated that they had agreed upon a general verdict; the counsel for both parties thereupon consented and the court announced that the special questions were withdrawn from the jury and then a general verdict in favor of the defendants was rendered. The first question, as it appeared in the case on appeal, had the word "yes" written under it. Plaintiff insisted that the proposition answered in the affirmative should be regarded and treated as a fact found by the jury. *Held*, untenable, and that the consent to the withdrawal of the questions constituted a waiver of the exception to their submission. *Id.*
8. Plaintiff brought an action to recover damages sustained through alleged fraudulent representations of defendant, inducing the purchase by her of certain stock. Plaintiff's evidence tended to show that the stock was worthless, and it was tendered back on the trial; one of the defendant's witnesses however testified to facts showing that it had some value. The trial judge after instructing the jury as to the particular facts necessary to establish defendant's liability, further instructed them, that if such facts were established to their satisfaction, plaintiff was entitled to a verdict for the amount paid by her for the stock to which the jury might add interest "by way of damages." Defendant's counsel excepted in these words: "I except to the instruction, that if the plaintiff is entitled to recover, she is entitled to recover the amount paid by her on the purchase of the stock whether that purchase be intended to include or exclude interest." *Held*, that the charge

was erroneous and that defendant's exception thereto was sufficient; that it was not necessary to specifically request the court to reconsider its decision and submit the question of damages to the jury; that plaintiff was entitled to recover the difference between the value of the stock as it was, and the value as it would have been had the representations been true; and that the question as to the actual value of the stock was one, which in the absence of any waiver, defendant was entitled to have determined by the jury. *Vail v. Reynolds*. 297

9. Also, that defendant's liability was not effected by the tender on trial, as the action was not one which permitted plaintiff to return the stock. - *Id.*

10. In an action by the owner of goods delivered to a commission merchant for sale against the latter, to recover as for money had and received, the proceeds of sale, it appeared that the goods were sold and sale reported before the commencement of the action. The report of sale did not state as to whether the goods had been paid for or not, but defendants claimed to apply the amount on an individual indebtedness to them. Defendants' evidence on the trial was to the effect that the goods were not in fact paid for until after the commencement of the action. *Held*, a refusal to submit to the jury the question as to whether defendants had actually received the proceeds of sale before suit brought, and as to whether they were by their acts estopped from denying it was error; that while in the absence of evidence of authority to sell on credit, the presumption from a simple report of sale would be that the sale was for cash, the presumption was not conclusive, and evidence to the contrary having been given, the question was one of fact for the jury. *Rosenberg v. Block*. 329

11. In an action against directors of a corporation organized under the act of 1875 (Chap. 611, Laws of 1875), providing for the organization of certain business corporations to

enforce the liability for a debt of the corporation imposed by said act (§ 21), because of the signing of a certificate or report false in a material representation; the alleged false representation was that the whole capital stock, \$700,000, had been fully paid in. The object of the corporation, as stated in its certificate of organization, was the purchase of lands and building thereon a seaside hotel, bath-houses, etc. It appeared that the whole stock was issued to A., one of the defendants, in payment for 120 acres of land on the sea shore which was conveyed, subject to a mortgage of \$72,000, the payment of which was assumed by the company. *Huntington v. Attrill*. 365

12. This land was part of 140 acres purchased by A. six months before the organization of the company, and in contemplation thereof, for \$80,000, of which he paid \$8,000 and gave the said mortgage to secure the balance. The defendants were directors of the company at the time of the conveyance of the property to it. The land had no known market value at that time, or intrinsic value of large amount, disconnected from a purpose to make a use of it such as was contemplated. Defendants' counsel asked the court to charge that by the words "at its fair value" in said act was meant "the fair value of such property for the uses and purposes of the company in the conduct of its legitimate business, and not the actual market value or the actual intrinsic value thereof at the time it is acquired." In response the court stated it knew of no value other than intrinsic or market value, and then charged that the jury had the right to consider, in determining the fair value, its value for the use to which it was to be put and the adaptability of it to any specific purpose; that these are constituent elements of intrinsic value, and although the value to be ascertained was at the time of the sale, any peculiar advantages, known or unknown, and which, even if known, would make it advantageous to a few only, properly entered into the consideration. *Held* no error. *Id.*

13. In response to a request by defendants to charge that before a verdict could be found for plaintiff the jury must be satisfied by affirmative proof that S. was authorized to indorse the name of the company, by prior resolution of the executive committee or board of directors, or by ratification, by resolution, or some equivalent act, the court charged that the jury must find either prior authority, or subsequent ratification, which could be evidenced by general course of business as well as by resolution. *Held*, no error.

Id.

14. In an action against the directors of a corporation, organized under the act of 1875 (Chap. 611, Laws of 1875), providing for the organization of certain business corporations, to recover a debt of the corporation, on the ground that defendants had signed a certificate, stating that the capital stock had been paid in, which was false. It appeared that the whole stock of the company was issued in payment for a piece of land conveyed to the company by defendant A., which plaintiff claimed was of much less value than the amount of stock. One of the plaintiff's witnesses gave, without objection, his opinion as to the value of the property so conveyed; after the cross-examination defendant's counsel moved to strike out this evidence as incompetent. This motion was denied. *Held*, no error; that the ruling was within the discretion of the court; that if the effect of the cross-examination upon the question of value was such that it was not entitled to any consideration, defendant's counsel had the right to have the jury so instructed by charge of the court, but not to have it stricken out on motion. *Hatch v. Attrill*.

383

15. After the jury retired they were directed by the court, with the consent of the parties, to bring in a sealed verdict the next morning, if they agreed in the meantime. They then presented a sealed verdict for plaintiff for \$50,000; the amount of the company's indebtedness to him was \$163,695.81. The

court refused to receive the verdict and directed the jury to again retire and instructed them, that if they found a verdict for the plaintiffs, to find it for the full amount claimed, which they did. *Held*, no error; that the question as to whether or not plaintiff was entitled to recover, was one of fact for the jury, but when this was found for the plaintiff, the measure of damages was the amount of the debt, and this he was entitled to recover; that the court had power to refuse to receive a verdict, which was not such a one as the jury was legally at liberty to render, and before it was recorded, to send the jury back to reconsider it. *Id.*

16. In an action to recover damages for personal injuries sustained by plaintiff, in being thrown from a loaded wagon, the hind wheel of which ran into a hole at a crossing on defendant's road, which the complaint alleged was caused by its negligence. The court, in its charge, stated to the jury "that they were not to understand that contributory negligence means any error of judgment," and that "mere error of judgment as to what particular part of the crossing he would drive this loaded wagon over could not be called negligence." *Held*, error; that the judgment required to be exercised is that of a man of ordinary prudence, and the charge should have been limited to an error of judgment such a man might have fallen into. *Hoyt v. N. Y., L. E. & W. R. R. Co.*

399

17. In an action to recover damages for injuries received by plaintiff through the falling of an elevator which defendants had just put into their store, it appeared that plaintiff, one of defendant's porters, who had no previous experience or knowledge, was selected to run the elevator, a fellow servant being assigned to instruct him; while left in the elevator without his instructor the accident happened. At defendants request the court charged: "If the jury find as matter of fact that the plaintiff was put under instruction of a competent instructor, and that he (the instructor) was as well ac-

quainted as defendants with the nature and character of the service which he undertook to perform, he cannot recover." *Held*, error. *Brennan v. Gordon*. 489

18. In an action to recover damages for injuries received by plaintiff while attempting to alight from one of defendant's trains, it appeared that as plaintiff was about stepping from the front platform of the fourth and last car the train suddenly started and she was thrown down and injured; between the third and fourth cars a brakeman was stationed whose duty it was to open the gates to permit the egress and ingress of passengers and then to close them, and give a signal by a pull upon a bell rope extending from the bell on the engine to where said brakeman was stationed; this signal was communicated to the next forward brakeman, whose duty it was to so hold the rope as not to permit the signal to pass him, and when he closed the gates under his control to transmit the signal by two pulls of the rope and so on until the signal reached the engineer, whose duty it was then to start the train. In this case the signal was given by the brakeman between the second and third cars; he testified that he received a signal which he supposed was given by the rear brakeman; the latter, however, testified that he gave none. To explain this, evidence was given on the part of the defendant tending to show that a passenger standing in the third car about the time the train stopped, caught hold of the bell rope to steady himself. Plaintiff gave evidence tending to impeach the credibility of the forward brakeman. The court charged that if the jury found the train was started by the passenger, defendant was not negligent, but if not so started, it was negligent. Defendant's counsel then requested the court to charge "that there was no proof that there was any vice in the system of communicating signals and the jury are not to consider the question;" this was refused, except as charged. *Held*, no error; that the proposition contained in the request could have no consideration unless the act of the pas-

senger caused the signal, and as the court had charged, in that case, defendant was not negligent, this rendered the question as to any defect in the system of signaling unimportant. *Ferry v. Manhattan R. Co.* 497

19. While parties to an action have a right to limit the issues to be tried to those made by the pleadings, they are not bound so to do, but may by mutual consent try any other issues. *Frear v. Sweet*. 454

20. A policy of fire insurance, upon a barn and contents, contained a condition that in case of any incumbrances upon the property they must be represented to the company in the application, otherwise the policy would be void; it also provided that all statements contained in the application should be warranties on the part of the assured. The application which was made by the authorized agent of the insured, contained a question as to the amount of incumbrances. The answer was "\$1,000." It appeared that the premises, upon which were the buildings insured, were at the time of the application incumbered by mortgages to the amount of over \$5,000. Said agent testified that the application was not read to him, and he did not read it; that defendant's agent, who filled it out, asked him if the premises were incumbered \$1,000, and he answered that there was over \$2,000 incumbrances on them. Defendant's agent testified that the agent of the insured stated the premises were incumbered for \$1,000, and he so wrote his answer in the application. The court instructed the jury that if they believed the testimony of defendant's agent, plaintiff could not recover, but if he was told that the incumbrance was over \$2,000 the discrepancy between such statement and the amount of the incumbrances was not a defense to the action. *Held*, error; that the discrepancy amounted to a material misrepresentation. *Smith v. A. Ins. Co.* 518

21. In an action to recover damages for injuries to plaintiff, a passenger on one of defendant's trains,

alleged to have been caused by defendant's negligence, plaintiff's evidence was to the effect that when the train stopped at her station, the guard whose duty it was to open the door of the car and fasten it by a catch provided for the purpose, and to open the gate on the platform, was absent from his post; that plaintiff opened the door, but did not shove it back over the catch, and stood in the doorway waiting for the opening of the gate; that when the guard came and opened the gate, he at the same time gave the signal for the train to start, which it did before she had time to leave the doorway, causing the door to swing to, upon her hand, injuring a finger. Plaintiff was a teacher in a public school, and also a private music teacher. She proved that she was unable to attend her school for six weeks, and for that period lost her salary as teacher; that the injury to her finger rendered it so sensitive that she could not strike the keys of the piano; that in giving music lessons it was necessary for her to play in connection with her instructions. There was no evidence as to the amount of her salary, or of her wages as a music teacher. The court charged among other things, that "nothing can be allowed specifically for any of these items." Defendant's counsel requested the court to charge that there was no evidence upon which they could give any damages for loss of time as a music teacher, or for absence from her position as school teacher. This was refused, except as already charged. *Held*, no error. *Baker v. Manhattan R. Co.* 533

22. Defendant contracted to construct a refrigerator for plaintiff, who was engaged in the business of preparing poultry for market, and with knowledge that plaintiff intended to at once make use of the refrigerator for freezing and preserving chickens for the May market following, expressly warranted that the freezer would keep them in perfect condition; this it failed to do, and in consequence a large quantity of chickens were lost. In an action upon the warranty, the court charged in sub-

stance, that plaintiff was entitled to recover as damages the difference between the value of the refrigerator as constructed and its value as it would have been if made according to contract, and also to recover the market value of the chickens lost, less cost of getting them to market and fees of commission men charged on sale. *Held*, no error. *Beeman v. Banta.* 538

23. Where part of an answer given to a proper question is not responsive, an objection and exception thereto does not present the question for review as to whether the testimony is competent; it can only be presented by motion to strike out. *W. C. & M. Co. v. Holbrook.* 586

24. For the purpose of discrediting a witness who has given material testimony in favor of the party calling him, the opposite side may, on cross-examination, show that the witness has been convicted of a crime, and of what crime, and the witness may be compelled to answer. (Penal Code, § 714.) *Spiegel v. Hays.* 660

TRUSTS AND TRUSTEES.

1. A husband and wife agreed to live separately, and to effectuate that agreement entered into articles of separation, through the medium of a trustee, by the terms of which the husband agreed to pay to the trustee, annually a sum named, for the support of the wife during life, the same to be in full satisfaction for such support and maintenance and of all alimony; the wife and trustee covenanted to save the husband harmless from his obligation to support her, and upon execution of the agreement the parties separated. In an action against the husband, to recover a payment under the agreement, *held*, that it was valid; that the trustee named was the trustee of an express trust, and that the action was properly brought in his name; also, *held* (FOLLETT, Ch. J., dissenting), that the agreement was not abrogated by a subsequent divorce of the parties, at least

when no provision for alimony was made in the decree of divorce. *Clark v. Fosdick.* 7

2. H. died seized of certain real estate and leaving four children, of whom plaintiff is one. They entered into an agreement for partitioning the land among themselves, by the terms of which plaintiff was to take her interest in a lot valued at \$20,000. This was to be conveyed by the owners to J., one of their number, who was to convey the same to plaintiff and her husband as tenants in common, upon payment by the husband of \$10,000 to a sister of the plaintiff. J. received a conveyance from his co-tenants in common, and directed the scrivener to draw a deed, from him to plaintiff and husband, as agreed, but the scrivener, by the direction of the husband, made out the deed to him alone; this was executed by J. without any knowledge of the variance from his instructions and with the intention on his part of carrying out the agreement; the change was not discovered by him or plaintiff until after the death of the husband, and she received no consideration for the transfer of her interest to him. In an action to have said deed reformed by inserting plaintiff's name as a grantee, *held*, that J., in taking title for purposes of the agreement, did so as trustee, and had no authority to convey, otherwise than as stipulated; that as to him and plaintiff, there was a mutual mistake of fact, which entitled her to the relief sought, as the portion of the agreement requiring him to convey to the husband an undivided half was independent of that requiring the conveyance to plaintiff, and gave the brother no power, right or authority to change, alter or modify the agreement to convey to her; that plaintiff's husband occupying that confidential relation to her, and, having obtained the conveyance as he did, the burden was cast upon him and his successors in title, of showing that the conveyance was free from fraud or mistake. *Haack v. Weicken.* 67

3. Also, *held*, that plaintiff's rights would not be affected if it appeared that her husband acted for her as

her agent; in which case, having procured the conveyance of her interest to himself without her knowledge or consent, she was entitled to have it adjudged that he took title in trust for her. (1 R. S. 728, §§ 51, 52). *Id.*

— As to liability of directors of a corporation organized under the act of 1875 (§ 14, chap. 611, Laws of 1875), for signing a false report.

See Huntington v. Attrill. 365
Hatch v. Attrill. 383

UNDERTAKING.

1. *It seems* where, in an action upon a bond or undertaking taken by a sheriff, a defense is interposed, based on the statutory provision (2 R. S. 286, § 59) prohibiting that officer from taking any bond, obligation or security "by color of his office in any other case or manner than such as are provided by law," the defense is not met by proof that the instrument was taken at the instance of the defendants; its validity or invalidity is not dependent upon the question as to whether it was extorted or voluntarily given. *Haberstro v. Bedford.* 187
2. Where an undertaking given to discharge a defendant from arrest, in an action for embezzlement, instead of being in precise compliance with the provisions of the Code of Civil Procedure in reference thereto (§ 575), followed the requirements of the Code of Procedure (§ 187); and so, in excess of the present statutory requirements, contained the condition that defendant would render himself amenable to the process of the court during the pendency of the action, *held*, that the word "process" as used referred only to such mandates of the court as are issued to enforce a decree or judgment; that as no process could be issued against defendant prior to the rendition of judgment, the extra condition added in no degree to the statutory obligation; and so, might be disregarded as surplusage. *Id.*
3. *It seems* the intent of the provision of the Code of Procedure was to

alleged to have been caused by defendant's negligence, the evidence was to the effect that when the train stopped at the station, the guard whose duty it was to open the door of the car and fasten it by a catch proper for the purpose, and to open the gate on the platform, was negligent from his post; that plaintiff closed the door, but did not step back over the catch, and stood in the doorway waiting for the opening of the gate; that when the guard came and opened the door he at the same time gave the signal for the train to start, which plaintiff did before she had time to get out of the doorway, causing the door to swing to, upon her hand, injuring a finger. Plaintiff was a teacher in a public school, and also a private music teacher. She proved that she was unable to attend school for six weeks, and for that period lost her salary as teacher; that the injury to her finger rendered it so sensitive that she could not strike the keys of the piano, thus making it impossible for her to give music lessons, which was necessary for her to play in connection with her instruction. There was no evidence as to the amount of her salary, or of her wages as a music teacher. The court charged among other things that "nothing can be alluded to specifically for any of these items." Defendant's counsel requested the court to charge that there was no evidence upon which they could give any damages for loss of plaintiff as a music teacher, or for loss from her position as school teacher. This was refused, except as already charged. *Held*, no error. *1 v. Manhattan R. Co.*

22. Defendant contracted to construct a refrigerator for plaintiff who was engaged in the business of preparing poultry for market and with knowledge that plaintiff intended to at once make use of the refrigerator for freezing and preserving chickens for the market following, expressly warranted that the freezer would keep them in perfect condition; but failed to do, and in consequence a large quantity of chickens were lost. In an action upon the warranty, the court charged in :

former; that the relation created between them by their contract was not that of a landlord and tenant or of trustee and *cestui que trust* but a relation analogous to that of vendor and vendee; and that, therefore, the action was not maintainable. *Hibbard v. Ramsdell*. 38

2. In an action to compel the specific performance of a contract, by which plaintiff agreed to sell and convey, free and clear of all incumbrances, to defendant a house and lot in the city of New York, it appeared that the former owners of the land in the block in which the premises in question were situated had mutually covenanted and agreed that twelve feet of the front of the lots should not at any time be built upon, but should be forever left open for court-yards. The court found, upon evidence to sustain the finding, that the salability of the property was injured by said covenant. *Held*, that the title tendered by plaintiff was not free and clear from incumbrances, as the covenant constituted an incumbrance; and that defendant was justified in refusing to complete his purchase. *Wetmore v. Bruce* 319

3. Also, *held*, that defendant was entitled to recover as damages by way of counter-claim the percentage paid by him at the time of purchase, the auctioneer's fees and the expenses paid for examining the title *Id.*

4. *It seems* it is only where the vendor in a contract for sale and conveyance of land is chargeable with bad faith that the vendee is entitled, upon breach of the covenant to convey, to recover damages measured by the goodness of his bargain or the financial benefit which would have resulted from performance. *Northridge v. Moore*. 419

5. The vendee, however, may recover back purchase-money paid by him and such expenses as he has reasonably incurred in examination of the title. *Id.*

6. The parties entered into a contract by which defendant agreed to convey to plaintiff certain

real estate. It was known by plaintiff that defendant at the time had no title to the property; the latter contracted in good faith relying upon a contract on the part of another to convey the premises to him, and both parties believed that defendant would acquire title before the time stipulated for the conveyance. Defendant was unable to perform by reason of the failure of the party who had agreed to convey to him to fulfil his contract. In an action to recover damages plaintiff recovered the expenses incurred in examining the title, with interest. *Held*, no error; that, although plaintiff was aware at the time of making the contract that defendant did not have the title, yet as both parties supposed he would obtain it, the reasonable expense of examining such title might be regarded as in the contemplation of the parties. *Id.*

7. In an action for specific performance of a contract to sell land it appeared that after the execution of the contract and before the time fixed for performance the defendant gave the plaintiff a verbal option to extend the time of performance for thirty or sixty days, provided at the time fixed for performance plaintiff would increase the purchase-price and pay an additional sum down. Plaintiff attended at the time and place specified and gave notice that he elected to accept the sixty days option and offered to pay the money required. Defendant was not present but was represented by an agent, who was not empowered to sign an extension for sixty days, and it was claimed on her behalf that in no event did the option permit an extension for more than thirty days. Said agent had no evidence of his authority to act for defendant in any respect. Plaintiff declined to make the payment except to defendant or some one showing authority to receive it. Said agent thereupon tendered a deed and demanded payment of the balance of the purchase-money called for by the original contract and upon plaintiff's failure to pay gave notice, that the contract was at an end and that defendant.

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withdrawn from the jury, and then a general verdict in favor of the defendants was rendered. The first question, as it appeared in the case on appeal, had the word "yes" written under it. Plaintiff insisted that the proposition answered in the affirmative should be regarded and treated as a fact found by the jury. *Held*, untenable, and that the consent to the withdrawal of the questions constituted a waiver of the exception to their submission. *Read v. Nichols*. 224

4. While in general, where exceptions have been taken on trial, it is erroneous to direct a verdict subject to the opinion of the General Term, the party taking the exceptions may waive them, and by consent the case may be submitted to the General Term, and where no exception was taken at the trial to the direction of a verdict and the objection to the power of the General Term to hear the case was not raised in that court, it will be deemed to have been waived. *Covenhoven v. Ball*. 231
5. Objections to the proceedings not connected with the matters in issue, but which are preliminary and go only to the right and power of the court to hear the case, are technical and are deemed to have been waived if the party proceeds with the trial or argument without raising them. *Id.*

WAREHOUSEMAN.

— When common carrier ceases to be liable as such, and becomes liable only as warehouseman.

Draper v. Pres't, etc., D. & H. C. Co. 118

WARRANTY.

1. Defendants contracted to purchase dressed beef of plaintiff, which the latter agreed should be beef that had not been heated before being killed; the beef to be delivered on board of cars at Chicago. In an action to recover the purchase-price, *held*, that plaintiff's agreement amounted to an express warranty, which survived delivery and acceptance; and that

defendants were entitled to recover damages, by reason of a breach thereof, by way of counterclaim. *F. C. Co. v. Metzger*. 260

2. It is not necessary, in order to constitute an express warranty on sale of goods, that the word "warranty" should be used; a positive affirmation as to quality, understood and relied upon by the vendee as such, is sufficient. *Id.*
3. The right to recover damages for the breach of such a warranty survives acceptance. *Id.*
4. As to whether the vendee has the right to return the property on discovery of the breach, *quære*. *Id.*
5. Defendant contracted to construct a refrigerator for plaintiff, who was engaged in the business of preparing poultry for market, and with knowledge that plaintiff intended to at once make use of the refrigerator for freezing and preserving chickens for the May market following, expressly warranted that the freezer would keep them in perfect condition; this it failed to do, and in consequence a large quantity of chickens was lost. In an action upon the warranty, the court charged in substance, that plaintiff was entitled to recover as damages the difference between the value of the refrigerator as constructed and its value as it would have been if made according to contract, and also to recover the market value of the chickens lost, less cost of getting them to market and fees of commission men charged on sale. *Held*, no error. *Beeman v. Banta*. 538

WIDOW.

See DOWER.

WILLS.

The will of D. disposed of his real estate as follows: "I give and bequeath all my real estate in fee simple to my three sons" (naming them), "and the survivor and survivors of them in case either die before me without issue—and in case either die before me leaving

issue, the share of such deceased child shall go to such issue." Two of the sons died before the testator, first H., who left three children, and thereafter J., who left no issue. In an action for partition of the real estate, *held*, that the surviving son took two-thirds and the children of H. one-third. *Davis v. Davis*. 411

— *When acceptance by wife of provision made for her benefit by her husband's will, will not preclude her from claiming equitable title to real estate, the legal title of which was in him at his death.*

See Haack v. Weicken

67

YONKERS (CITY OF).

1. Plaintiff, in 1848, conveyed to the town of Yonkers a tract of land in the village of Yonkers; by the terms of his deed the conveyance was upon the condition that a certain portion of said land should thereafter be and remain a part of a street named, and never be used for any other purpose, and that the residue of the premises conveyed "shall forever hereafter remain public and open as a public highway, and that no house, building or other erection whatever, except a public monument, shall ever be built or erected or permitted upon the said land, or any part thereof." The village was not then, but was afterward incorporated, and subsequently was incorporated as a city, and vested with the rights of property of the town. (Chap. 331, Laws of 1855; chap. 866, Laws of 1872.) In an action of ejectment based on the ground of a breach of said conditions, evidence was given tending to show that the premises in question were, at the time of the conveyance, bounded by a building, which was afterwards taken down and a new one erected, the wall of which encroached about sixteen inches upon said premises; the location of the line however was in dispute, and there was other evidence to the effect that there was no encroachment, and if any in fact existed, it did not appear it was with defendant's knowledge. It also appeared that an area on the south side of said

building further encroached about six feet upon said premises; that said area was covered by a sidewalk in which was a grating and a door covering a stairway, which, when open, is an obstruction, but when closed is, with the grating, flush with the sidewalk. It did not appear that the door had, by being left open, been an obstruction. *Held*, that while the purpose of the conditions was to preserve the use of the premises for a street or public highway, and anything erected upon them inconsistent with that use would be a violation thereof, it could not be assumed that what is usually or commonly permitted or required in streets of villages and cities came within the prohibition, and the construction of the area was not an erection upon the land within the meaning of the conditions, nor was it rendered so by use. *Rose v. Hawley*. 502

2. Also, *held*, that the city was not chargeable with notice of any encroachment of the wall of the building upon the premises, and, conceding it existed as, it was without permission or knowledge on the part of the city, it could not be held to be a breach of the condition; that to justify such a claim and thereby to defeat the title, it must appear that the encroachment was in some sense permitted by the city. *Id.*

3. *It seems*, the duty imposed upon the municipal authorities was that of diligence to protect the premises for the declared public use and against the prohibited invasion, and they were required to observe that of which reasonable diligence would advise them in that respect. *Id.*

4. It appeared that plaintiff had observed the erection of the building, the wall of which it was claimed encroached on the reserved premises in 1857; that he knew when the wall was rebuilt in 1866, and protested, but never called the attention of defendant's board of trustees to the matter. *Held*, it could not be held as matter of law that he waived his right to assert by action the alleged breach. *Id.*

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